The fair price rule and the South African law of contract: A historical and comparative analysis

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Wiaan Visser December 2018

ABSTRACT

This thesis focuses on legal rules that allow a court to set aside or modify a contract on the basis of a large discrepancy in the value of the respective performances. These “fair price” or “just price” rules have been the object of debate and disagreement among jurists for centuries.

Although one such a rule previously formed part of the South African common law of contract, the prevailing view is that the price does not have to be fair or reasonable for a contract to be valid.

However, due to changing attitudes to price control both locally and internationally, this view might require reconsideration. To this end, the study traces the treatment of fair price rules historically and comparatively, and thereafter evaluates the application of these rules in the South African context by taking account of certain underlying values and principles of the law of contract.

The historical overview studies the development of the fair price rule from its origins in late classical Roman law to its reception and subsequent abolition in modern law. The overview shows that jurists during the Middle Ages had a well thought-out understanding of the fair price rule as a doctrine aimed at enforcing a market-oriented just price in order to avoid the exploitation of weakness, price discrimination, fraud, and exceptionally harsh bargains.

The comparative overview in turn shows that while a variety of different approaches to dealing with substantively unfair prices exist, there are signs of an increased willingness to engage in price control. It is also evident that more modern fair price rules follow a flexible approach to the determination of whether the price is fair. This approach does not only take account of the objective disparity in the value of the respective contractual performances, but also of the procedural fairness of the conclusion of the contract. These modern fair price rules follow a similarly flexible approach to restitution, by investing the court with the discretion to adapt the contract price, or to avoid the contract and award damages to the disadvantaged party.

Building on the comparative and historical analysis, the thesis concludes that it would be both desirable and suitable that a modern fair price rule, which follows a

flexible approach to the determination of fairness, should be introduced into South African common law of contract. This can be achieved through the development of the common-law rule that contracts may not be contrary to public policy. It is argued that this will lead to a law of contract that is better equipped to provide relief to prejudiced contracting parties, and that gives greater effect to a number of fundamental values of our law of contract, such as dignity, party autonomy, good faith, and *Ubuntu*.

OPSOMMING

Die fokus van hierdie tesis is gerig op regsreëls wat howe toelaat om ‘n kontrak ter syde te stel of te wysig as gevolg van ‘n ernstige wanverhouding tussen die waarde van die onderskeie prestasies. Hierdie “billike prys” of “regverdige prys” reëls is reeds vir eeue ‘n bron van dispuut onder regsgeleerdes.

Alhoewel so ‘n reël voorheen deel gevorm het van die Suid Afrikaanse kontraktereg, is die heersende mening dat die prys nie regverdig of billik hoef te wees vir ‘n kontrak om geldig te wees nie.

Hierdie posisie verdien egter heroorweging in die lig van veranderende houdings jeens prysbeheer in Suid Afrika en die buiteland. Met hierdie doel voor oë begin hierdie studie met ‘n regshistoriese en regsvergelykende ondersoek na die toepassing van “billike prys” reëls, en evalueer dan die toepassing van hierdie reëls in die Suid Afrikaanse konteks met betrekking tot sekere onderliggende waardes en beginsels van die kontraktereg.

Die regshistoriese oorsig ondersoek die ontwikkeling van die “billike prys” reël vanaf sy oorsprong in die laat-klassieke Romeinse reg tot sy resepsie en uiteindelike afskaffing in die moderne kontraktereg. Die ondersoek toon dat juriste gedurende die middeleeue ‘n goeddeurdagte begrip gehad het van die “billike prys” reël as ‘n leerstuk gemik op die afdwinging van ‘n markgeoriënteerde prys, ten einde die uitbuiting van kwesbaarheid, prysdiskriminasie, bedrog, en uitsonderlike nadelige kontrakte te bekamp.

Die regsvergelykende oorsig toon weer dat, alhoewel ‘n verskeidenheid van benaderings tot die bekamping van onregverdige pryse bestaan, ‘n toenemende bereidwillligheid om pryse te beheer waargeneem kan word. Dit is verder duidelik dat moderne “billike prys” reëls ‘n buigsame benadering volg tot die vastelling van wanneer ‘n prys onregverdig is. Hierdie benadering neem nie slegs die objektiewe verskil in die waarde van die onderskeie prestasies in terme van die kontrak in ag nie, maar ook die prosedurele billikheid van kontraksluiting. Hierdie moderne “billike prys” reëls volg ook ‘n buigsame benadering tot restitusie, wat aan die hof die nodige bevoegdheid verleen om die prys aan te pas, of om die kontrak ter syde te stel en skadevergoeding toe te ken aan die benadeelde party.

Op grond van die regsvergelykende en regshistoriese analise, is die tesis se gevolgtrekking dat dit beide wenslik en gepas sal wees indien ‘n “billike prys” reël, wat ‘n buigsame benadering volg tot die vastelling van wanneer die prys regverdig is, deel sou word van die Suid Afrikaanse kontraktereg. Dit kan geskied deur middel van die verdere ontwikkeling van die gemeenregtelike reël dat kontrakte nie strydig mag wees met die openbare belang nie. Dit word geargumenteer dat so ‘n ontwikkeling sal lei tot ‘n kontraktereg wat beter ingerig is om bystand te verleen aan benadeelde partye, en wat sterker uiting sal gee aan ‘n aantal grondliggende waardes van ons kontraktereg soos menswaardigheid, party-outonomie, goeie trou, en *Ubuntu*.

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LIST OF ABBREVIATIONS

ABGB	*Allgemeines bürgerliches Gesetzbuch* (Austrian civil code)
ACP	*Archiv für die civilistische Praxis*
BGB	*Bürgerliches Gesetzbuch* (German civil code)
BGH	*Bundesgerichtshof* (Germany)
BMJ	British Medical Journal
BVerfG	*Bundesverfassungsgericht* (Germany)
C	Justinian *Codex*
CILSA	*The Comparative and International Law Journal of Southern Africa*
CPA	Consumer Protection Act 68 of 2008
CESL	Common European Sales Law
CMLR	Common Market Law Review
CLR	California Law Review
D	Digest of Justinian
DFCR	Draft Common Frame of Reference
ERCL	European Review of Contract Law
ECJ	Court of Justice of the European Union
JB	*Juristische Blätter*
JBE	Journal of Business Ethics
J Econ Hist	Journal of Economic History
JLS	Journal of Legal Studies
LJ	Law Journal

LR	Law Review
LHR	The Legal History Review
LQR	Law Quarterly Review
MLR	Modern Law Review
MüKo	*Münchener Kommentar zum Bürgerlichen Gesetzbuch*
NJW	*Neue Juristische Wochenschrift*
OGH	*Oberster Gerichtshof* (Austria)
OLG	*Oberlandesgericht* (Austria and Germany)
PECL	Principles of European Contract Law
PICC	UNIDROIT Principles of International Commercial Contracts
PrALR	*Allgemeines Landrecht für die Preußischen Staaten* of 1794
RG	*Reichsgericht* (Germany)
RIDA	*Revue Internationale des droits de l'Antiquité*
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
SAPL	South African Public Law
Stell LR	Stellenbosch Law Review
TAPS NS	Transactions of the American Philosophical Society, New Series
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
Transl	Translator
TSAR	Tydskrif vir die Suid-Afrikaanse Reg
UNIDROIT	International Institute for the Unification of Private Law

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CHAPTER 1: INTRODUCTION

1 1 Introduction and problem identification

The question of whether it is possible for a contract price to be fair or just, and by contrast unfair or unjust, has engaged jurists, philosophers, and theologians alike through the ages.[1] At the centre of this dispute stands the post-classical Roman legal doctrine of *laesio enormis*, which allows a disadvantaged contracting party to rescind a contract if the contract price is less than half, or more than double, the fair price or *iustum pretium* of the *merx*.[2]

At times this doctrine and other rules like it seeking to enforce equality in exchange have been viewed as cornerstones of the law of contract;[3] and at other times as relics from the past that are fit for nothing more than ridicule.[4] These rules, which allow a court to set aside contracts on the basis that a large discrepancy exists in the value of the respective performances, can be referred to as "fair price" or "just price" rules.[5]

Fair price rules are usually said to have fallen out of favour during the 18th and 19th century, as legal scholars under the increasing influence of economic liberalism and freedom of contract held that the price and contents of a contract depend solely on the will of the parties, and that any attempt to impose a *iustum pretium* would therefore infringe on the autonomy of the contracting parties.[6]

This narrative holds equally true in South Africa. The doctrine of *laesio enormis*, which was received into our law from Roman-Dutch law, was first abolished in the Cape Colony in 1879,[7] then in the Free State in 1902,[8] and finally in the whole of South Africa by the General Law Amendment Act 32 of 1952. The relevant section of

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[1] See T Finkenauer "Laesio Enormis" in J Basedow, KJ Hopt, R Zimmermann, & A Stier (eds) *The Max Planck Encyclopedia of European Private Law* II (2012) 1029; J Gordley "Equality in Exchange" (1981) 69 *CLR* 1587; H Kötz *European Contract Law* 2 ed (transl G Mertens & T Weir, 2017) 110-111.
[2] However, in its original form the remedy was only available to the seller of land; see 2 3 2 below.
[3] See Gordley (1981) *CLR* 1587; Zimmermann *Obligations* 265.
[4] See Zimmermann *Obligations* 267; A Perrone "The Just Price Doctrine and Contemporary Contract Law: Some Introductory Remarks" (2014) 125 *Rivista Internazionale di Scienze Sociali* 217 218.
[5] See for example H Eidenmüller "Justifying Fair Price Rules in Contract Law" (2015) 11 *ERCL* 220; MW Hesselink "Could a Fair Price Rule or its Absence be Unjust?" (2015) 11 *ERCL* 185.
[6] See 3 2 below; Zimmermann *Obligations* 264, 265; Gordley (1981) *CLR* 1587.
[7] See s 8 of the General Law Amendment Act 8 of 1879.
[8] See s 6 of the General Law Amendment Ordinance Act 5 of 1902.

the latter declared that no contract shall be void or voidable "merely by reason of *laesio enormis* [i.e. great prejudice] sustained by either of the parties to the contract."[9]

Although this legislative abolition was supposedly in reaction to criticism levied against the doctrine in *Tjollo Ateljees (Eins) Bpk v Small*[10] (henceforth *Tjollo Ateljees*), South African courts also expressed their disapproval of the working and theoretical foundation of the doctrine of *laesio enormis* in a number of cases.[11] The doctrine was characterised variously as "crude and wanting" in elasticity,[12] virtually impossible to apply in practice,[13] "inherently arbitrary and preposterous",[14] not in harmony with "immanent reason or public policy",[15] hardly in conformity with the altered conditions of modern times,[16] and "out of place in the modern law of contract".[17]

As a consequence the South African common law of contract generally does not require that a contract price has to be fair or reasonable for a contract to be valid. Traditionally the only requirements are that the contract price must be pecuniary, certain, and true.[18] Conversely, the common law of contract provides no specific remedy to contracting parties seeking to escape the enforcement of a contract on the basis that the contract price is unfair.[19]

1 2 Equity and fairness in the South African law of contract

On which grounds might prejudiced contracting parties then be able to avoid the enforcement of manifestly unfair contract prices?

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[9] See s 25 of the Act; see also HR Hahlo & E Kahn "Two Important Changes in the Common Law" (1952) 69 *SALJ* 392 395.
[10] 1949 1 SA 856 (A).
[11] For an overview of these cases see Hahlo & Kahn (1952) *SALJ* 393; J Barnard "Unfairness of Price and the Doctrine of *Laesio Enormis* in Consumer Sales" (2013) 76 *THRHR* 521 524-526; P Aronstam *Consumer Protection, Freedom of Contract and the Law* (1979) 44-45.
[12] *Botha v Assad* 1945 TPD 1 4.
[13] *Botha v Assad* 1945 TPD 1 8; *Tjollo Ateljees (Eins) Bpk v Small* 1949 1 SA 856 (A) 860; see also the discussion in *Cotas v Williams* 1947 2 SA 1154 (T).
[14] *Tjollo Ateljees (Eins) Bpk v Small* 1949 1 SA 856 (A) 860, 871.
[15] 873.
[16] *Mcgee v Mignon* 1903 TS 89 96.
[17] *Tjollo Ateljees (Eins) Bpk v Small* 1949 1 SA 856 (A) 860.
[18] See for example R van den Bergh "The Roman Tradition in the South African Contract of Sale" (2012) *TSAR* 53 72.
[19] See however the discussion of the public policy rule and section 48(1)(a)(i) of the Consumer Protection Act 68 of 2008 in the following section.

Historically the *exceptio doli generalis*, which gave the court an equitable discretion to decide cases in terms of fairness and reasonableness, had been used by South African courts to promote equitable outcomes.[20] However, since it was found in *Bank of Lisbon and South Africa Ltd v De Ornelas*[21] that the *exceptio doli* does not form part of South African contract law, this avenue is closed to parties seeking to escape from a substantively imbalanced contract on equitable grounds.

Neither could *bona fides* fulfil such a function. The Supreme Court of Appeal confirmed in *Brisley v Drotsky*[22] that the abstract principle of good faith is not an independent basis which parties can use to avoid harsh contract terms, but rather fulfils an indirect function as a value underlying our law of contract. The same arguably holds true for fairness[23] and *Ubuntu*,[24] inasmuch as they are values that underlie our law of contract, rather than substantive rules that can directly be relied on by contracting parties seeking relief from harsh bargains.

The South African law of contract also does not recognise abuse of circumstances of a disadvantaged party as a ground for invalidating a contract.[25] While the extension of the traditional grounds of procedural unfairness to include the abuse of circumstances and other forms of improperly obtained consent could be supported, it arguably does not present a complete solution to the problem of unfair contract prices. Even validly concluded contracts might still be manifestly unfair, for example due to the inexperience or poor bargaining skill of the disadvantaged contracting party.[26]

If neither direct reliance on equitable values, nor the extension of the traditional grounds of procedural fairness is able to provide satisfactory relief to prejudiced

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[20] R Zimmermann "Good Faith and Equity" in R Zimmermann & D Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* (1996) 217 218-210; HM Du Plessis *The Harmonisation of Good Faith and Ubuntu in the South African Common Law of Contract LLD Thesis*, University of South Africa (2017) 119-122.
[21] 1988 3 SA 580 (A) 605-606.
[22] 2002 4 SA 1 (SCA) para 22.
[23] See *Bredenkamp v Standard Bank of SA Ltd* 2010 4 SA 468 (SCA) paras 50-53; *African Dawn Property Finance 2 (Pty) Ltd v Dreams Travel & Tours CC* 2011 3 SA 511 (SCA) para 28; *South African Forestry Co Ltd v York Timbers Ltd* 2005 3 SA 323 (SCA) para 27.
[24] See *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 1 SA 256 (CC) paras 22-24.
[25] JE du Plessis "Illegal Contracts and the Burden of Proof" (2015) 132 *SALJ* 664 683-684.
[26] See also the discussion on fair price rules as a mechanism to protect party autonomy at 4 2 6 3 below.

contracting parties, it begs the question whether it would not be better to confront the problem of substantively unfair prices head-on through introducing a rule which, similar to the doctrine of *laesio enormis*, allows a court to set aside a contract because of a manifestly unfair price, i.e. due to the result of the bargaining process rather than the process itself.[27]

In contrast to the falling out of favour which fair price rules experienced in the 18th and 19th century, such rules appear to be undergoing a revival due to changing attitudes towards price control both domestically and internationally. This is evidenced not only by a resurgence of academic interest in fair price doctrines,[28] and the inclusion of fair price rules in a number of international contractual regimes,[29] but also in foreign law where fair price rules have attained prominence in a number of jurisdictions through the course of the 20th century,[30] either through the modernisation of doctrines such as *laesio enormis*, or through the development of doctrines such as public policy in order to provide relief to prejudiced contracting parties.

One manner in which such a rule might therefore be introduced into our law would be through the development of the public policy rule.[31] In theory any term (including the contract price) has to meet the requirement that its content or enforcement should not be contrary to public policy. While unfairness as such might not be an independent ground on which a contract can be set aside, the judgments in *Sasfin (Pty) Ltd v Beukes*,[32] and *Barkhuizen v Napier*,[33] seem to indicate that manifest unfairness could result in a contract being declared contrary to public policy. In theory at least, it might therefore be possible for a court to set aside a manifestly unfair

[27] See for example LF van Huyssteen, MFB Reinecke, & GF Lubbe *Contract General Principles* 5 ed (2016) 126.
[28] See for example Perrone (2014) *Rivista Internazionale di Scienze Sociali* 217; Eidenmüller (2015) *ERCL* 220; Hesselink (2015) *ERCL* 185; T Gutmann "Some Preliminary Remarks on a Liberal Theory of Contract" (2013) 76 *Law and Contemporary Problems* 39.
[29] See 3 7 below; M Hesselink "Unfair Prices in the Common European Sales Law" in L Gullifer & S Vogenauer (eds) *English and European Perspectives on Contract and Commercial Law* (2014) 225.
[30] See Finkenauer "Laesio Enormis" in *Max Planck Encyclopedia* 1031; Kötz *Contract Law* 110, 111; Gordley (1981) *CLR* 1587-1588.
[31] This is discussed in more detail at 6 2 below.
[32] 1989 1 SA 1 (A) 14-15; see also GF Lubbe "Taking Fundamental Rights Seriously" (2004) 121 *SALJ* 395 398-399; FDJ Brand "The Role of Good Faith, Equity and Fairness in the South African Law of Contract: The Influence of the Common Law and the Constitution" (2009) 126 *SALJ* 71 84-85
[33] 2007 5 SA 323 (CC) paras 49-60.

contract price for being contrary to public policy. However, thus far this avenue does not seem to be borne out in practice.

Such a rule could also be introduced by statute. In this regard the South African legislature has already introduced a type of a fair price rule in section 48(1)(a)(i) of the Consumer Protection Act 68 of 2008 ("CPA"). Although this provision might be said to signal an increased willingness to engage in price control domestically, it is limited in scope to transactions falling within the ambit of the CPA,[34] and does not appear to have been of great effect thus far; perhaps due to the high hurdles faced by disadvantaged contracting parties seeking relief in terms of the CPA.[35]

The provision in question would, for example, not apply to transactions between certain juristic persons,[36] or once-off transactions which are not in the ordinary course of business of the supplier.[37] It is unclear for our purposes why disadvantaged parties who suffer great prejudice from transactions in the ordinary course of business are any more deserving of protection than parties who suffer harm from other transactions. In principle at least, there also exists no reason why juristic persons cannot likewise be prejudiced by manifestly unfair prices, and why they are therefore not worthy of protection.[38]

Considering that the South African common law of contract currently does not seem to be able to provide satisfactory relief to contracting parties prejudiced by unfair contract prices, and considering the fact that attitudes towards fair price rules are changing internationally, and that a fair price rule limited in scope has already entered our law through section 48(1)(a)(i) of the CPA, this study investigates whether it would indeed be desirable to introduce a fair price rule to the South African common law of contract, and if so, how such a rule should best function.

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[34] See s 5 of the Act, which sets out its application.
[35] The CPA is discussed in more detail at 6 3 below.
[36] Section 5(2)(b).
[37] See the definition of "transaction" in s 1 of the Act; see also E de Stadler "Section 5" in T Naudé & S Eiselen (eds) *Commentary on the Consumer Protection Act* (RS 1 2016) paras 6-7, 39-43.
[38] See for example JE du Plessis "Grounds for Avoidance" in S Vogenauer (ed) *Commentary on the UNIDROIT Principles of International Commercial Contracts* 2 ed (2015) 511.

1 3 Methodological approach and overview

The methodology adopted in this thesis is to trace the treatment of fair price rules historically and comparatively, and thereafter to evaluate and consider the application of these rules in the South African context by taking into account certain basic legal principles and values.

The thesis is structured as follows. Chapter 2 commences with an investigation into the development of the doctrine of *laesio enormis* over the course of about a millennium, from its inception in late Roman law, to its study by first students of Roman law in Bologna, the medieval canon lawyers, the late scholastics, and finally to its reception into Roman-Dutch law. The chapter goes further than merely explaining how the modern legal position came about by seeking to cast light on the different ways in which the doctrine of *laesio enormis* had been developed, understood, and justified throughout these periods.

However, as enormously influential as the doctrine of *laesio enormis* may have been, it is only one manifestation of the fair price rule. Many of the shortcomings criticised by the judges in *Tjollo Ateljees*, and by detractors of the doctrine in general, are not weaknesses of fair price rules as such, but rather of the specific legal construct of the *laesio enormis*. It is also important to appreciate that South African law is hardly alone in struggling with these problems, and that a number of foreign legal systems have sought the solution in some or other fair price rule.

To this end, the comparative overview in chapter 3 seeks to provide an overview and analysis of the manner in which several modern legal systems approach equality in exchange, and more specifically substantive fairness in price.

The chapter considers the legal position in Germany, Austria, the English common law, and in the American state of Louisiana, as well as in a number of international model rules. Germany, Austria, and Louisiana were chosen because of the nature and prominence of their respective fair price rules, and the rich body of literature that is available on the topic. Louisiana has the added advantage of presenting some interesting parallels as a mixed legal system. The English common law, by contrast, has no one rule which can be described as a fair price rule, but rather regulates fairness in price through a number of interrelated, yet completely unsystematic

doctrines. In this sense it is much closer to the current position in South Africa, and makes for interesting comparison.

With the lessons learned from the historical and comparative chapters in mind, chapter 4 attempts to evaluate the desirability of the introduction of a fair price rule measured against a number of values and principles which are considered important in South African contract law, such as party autonomy, dignity, economic efficiency, and legal certainty.

Chapter 5, drawing on the findings of the previous chapters, evaluates how a fair price rule should best function. As has been referred to above, the doctrine of *laesio enormis* was bedevilled by questions as to how it should be applied correctly. However, it is unclear to what extent these problems were unique to that doctrine, or if they could be avoided entirely by proper construction of a fair price rule.

The concluding chapter discusses the possible avenues for the introduction of a fair price rule, by legal development or reform, into current South African law of contract. Such a rule might be introduced by the legislature adopting a statutory remedy, which is to some extent already the case with section 48(1)(a)(i) of the CPA. Alternatively, the possibility exists for judicial development of the common law by building on judgments such as those in *Sasfin (Pty) Ltd v Beukes*[39] and *Barkhuizen v Napier*.[40]

[39] 1989 1 SA 1 (A).
[40] 2007 5 SA 323 (CC).

CHAPTER 2: A HISTORICAL OVERVIEW OF THE CONCEPT OF A FAIR PRICE OR *IUSTUM PRETIUM*

2 1 Introduction

This chapter examines the historical origins and subsequent development of the fair price rule in Roman, Medieval, and Roman-Dutch law. While the fair price rule has to a greater or lesser extent been present during all of these periods, it has undergone significant change in its scope, functioning, and purpose. It would be futile to attempt to document its entire history in a single chapter, and there is no shortage of other sources available that do so in a more comprehensive fashion.[1] The chapter rather seeks to identify lessons to be learnt from the history of the doctrine, with a view to using these lessons in later chapters in order to discuss the application and desirability of such a rule in the modern legal context.

The chapter commences with the position in classical Roman law.[2] It becomes apparent that while the fair price rule was certainly exceptional in nature, the Roman law of contract was not wholly unconcerned with the equality of performances of the contracting parties either. From there the study moves on to the establishment and subsequent expansion of the fair price rule in late Roman law, early medieval Roman law, canon law, and Roman-Dutch law. During this period the fair price rule was rationalised, refined, and concretized in such a manner that it became an independent legal remedy; in substance adopting the principle proportionality of performances.[3] The fair price rule was, however, far from an abstract principle. It was rather a very real part of everyday life in the market economy of medieval and early modern Europe.[4]

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[1] See for example JW Baldwin "The Medieval Theories of the Just Price: Romanists, Canonists, and Theologians in the Twelfth and Thirteenth Centuries" (1959) 49 *TAPS NS* 1-92; R Zimmermann *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1990) 255-270; J Hallebeek "Some Remarks on *Laesio Enormis* and Proportionality in Roman-Dutch Law and Calvinistic Commercial Ethics" (2015) 21 *Fundamina* 14 24; IH van Loo *Vernietiging van Overeenkomsten op Grond van Laesio Enormis, Dwaling, of Misbruik van Omstandigheden* LLD Thesis, Open Universiteit (2013); W Decock *Theologians and Contract Law: The Moral Transformation of the Ius Commune (ca. 1500-1650)* (2013) 507-601; H Kalb *Laesio Enormis in Gelehrten Recht* (1992).

[2] See 2 3 1 below.

[3] See Hallebeek (2015) *Fundamina* 21.

[4] See for example Baldwin (1959) *TAPS NS* 24-25 who discusses the occurrence of clauses renouncing the remedy in contracts during the 12th and 13th century; see JW Whitman "The Moral Menace of Roman Law and the Making of Commerce: Some Dutch Evidence" (1996) 105 *Yale LJ*

2 2 Classical Roman law

It was not a requirement in classical Roman law that the purchase price had to be fair.[5] The three main requirements were that price had to be in money, certain, and true.[6] However, there were legal mechanisms or doctrines that might have contributed to ensuring a fair price. These will be considered, after the three main requirements have been briefly explored.

2 2 1 The price had to be in money.

The question of whether the price had to be in money is primarily relevant for distinguishing between contracts of sale and contracts of exchange.[7] Whether a party is viewed as the purchaser or vendor comes with a host of substantive considerations in contracts of sale, such as the availability of certain remedies.[8] It has little bearing on the fairness of the price.

2 2 2 Verum pretium

The requirement that the price had to be *verum*, literally translated as "true", is better understood as requiring that the price had to be "real" or "serious". This did not require that price needed to be fair or adequate;[9] even a completely unjust price would still be *verum* as long as the contracting party was serious in his intent.[10]

2 2 3 Certum pretium

The final requirement was that the price needed to be certain. Classical Roman law did not allow sale at an unspecified "reasonable price",[11] nor did it allow an agreement where the price would be determined by the purchaser.[12] The price was, however, considered to be certain where it was readily ascertainable, in line with the

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1841 1854, who states that the law of just price in sales was centrally important to the organization of pre-modern markets; see also JM Eligedo "Just Price: Three Insights from the Salamanca School" (2009) 90 *JBE* 29-46 for a discussion of the practices in the Spanish late scholastics.

[5] Zimmermann *Obligations* 255; J Gordley & AT von Mehren *An Introduction to the Comparative Study of Private Law – Readings, Cases, Materials* (2006) 461; Baldwin (1959) *TAPS NS* 1 19; P Birks *The Roman Law of Obligations* (2014) 70.

[6] See Baldwin (1959) *TAPS NS* 19; Zimmermann *Obligations* 250-255.

[7] Birks *Roman Law* 69.

[8] See Zimmermann *Obligations* 251-252; Baldwin (1959) *TAPS NS* 19; Birks *Roman Law* 70.

[9]; Zimmermann *Obligations* 252.

[10] 252.

[11] Baldwin (1959) *TAPS NS* 19.

[12] Zimmermann *Obligations* 254.

maxim *certum est quod certum reddi potest*.[13] Parties did not have to name the actual price, but could fix the price with reference to objective criteria.[14] The method used to determine the price had to ensure that there is no need for further negotiation.[15]

A question which gave rise to considerable debate among classical writers was whether the parties could agree that the price would be determined by an independent third party. This position was settled in the post-classical period by Justinian, who ruled that such a sale was conditional, becoming effective once the third party named the price. If the third party did not name a price the agreement would lapse and be void.[16] C 4 38 15 indicates that discretion of the third party to determine the price has to be exercised with the judgment of a reasonable man (*viri boni arbitrium).*[17] Determination of whether this discretion was indeed exercised in a reasonable manner requires an assessment of the reasonableness of the price.

Modern arguments against sale at an unspecified reasonable price tend to point to the difficulty of determining a reasonable price, holding such agreements to be void for reason of vagueness.[18] The Roman legal system however did not balk at assessing the value of a thing. There are several instances in which a Roman *iudex*, or alternatively the praetor, were called upon to estimate the value of goods, or the fair price thereof.[19]

Restitutio in integrum, for example, had its origin as remedy to protect minors who had entered into prejudicial contracts. The praetor in this case had to estimate the "true value" of the goods in order to restore to the injured minor the difference.[20] The true value in these cases was an estimate of the value which a regular person would place on the *merx* under normal circumstances: free of price shocks and market

[13] Birks *Roman Law* 69.
[14] Zimmermann *Obligations* 253.
[15] Birks *Roman Law* 69.
[16] C 4 38 15; see also Birks *Roman Law* 69; Zimmermann *Obligations* 254.
[17] See Birks *Roman Law* 70.
[18] For a discussion of the position in South African law see *Genac Properties JHB (Pty) Ltd v NBC Administrators CC* 1992 1 SA 566 (A).
[19] Baldwin (1959) *TAPS NS* 20; see E Koops "Price Setting and other Attempts to Control the Economy" in PJ Du Plessis, C Ando, & K Tuori (eds) *The Oxford Handbook of Roman Law and Society* (2016) 609 614-617.
[20] Baldwin (1959) *TAPS NS* 19-20; see also the discussion of the *Lex Laetoria* below at 2 2 4 2.

failures, as well as personal sentiment and interest.[21] The *actio quanti minoris*, another such example, was an aedilitian action available in the case of latent defects or *dicta et promissa*.[22] This remedy allowed the purchaser to claim the difference between the actual worth of a thing, and putative worth, had it been free from defects, or possessed the promised qualities.[23] There is also evidence that the scope of this remedy was extended beyond aedilitian actions already in classical Roman law, to latent defects under the *actio empti,* also entitling the purchaser to a reduction in price. Both of these cases necessitate some judicial estimation of the actual and putative worth of a thing.[24] Even if Roman law did not have a fair price rule, it still necessitated at times determining a fair price.

2 2 4 The limits of contractual freedom in Roman law

While Roman law is usually considered liberal with regards to contractual freedom, it nevertheless recognised mechanisms aimed indirectly at ensuring a degree of equality in exchange. Three of these mechanisms will be discussed below. The first relates to fraud, the second to limitations on contractual capacity, and the third to limitations imposed by duty and custom.

2 2 4 1 Free negotiation short of fraud

As indicated earlier, Roman law followed a decidedly liberal approach to contractual arrangements,[25] and did not require that the contract price had to be fair or reasonable. According to an important text in the Digest, parties were allowed to purchase a thing for more or less than the fair or market price and so attempt to outwit or outmanoeuvre each other – *invicem se circumscribere*.[26]

According to this view, parties were allowed to take advantage of each other in accordance with natural law.[27] Roman law only established a framework within which contracts could be concluded,[28] and as such the perception is that it was not greatly

[21] Koops “Price Setting” in *Roman Law and* Society 615.
[22] See Zimmermann *Obligations* 315
[23] 318.
[24] See Baldwin (1959) *TAPS NS* 20; Koops “Price Setting” in *Roman Law and* Society 612-613.
[25] Baldwin (1959) *TAPS NS* 17.
[26] D 19 2 22 3.
[27] D 4 4 16 4.
[28] Zimmermann *Obligations* 258.

concerned with questions of equity or fairness in the contract. This freedom should however not be understood as allowing parties to defraud each other.

The presence of fraud or *dolus* would give rise to special defences available to the affected party. In *stricti iuris* contracts the defrauded party would be able to include a clause in the formula called the *exceptio doli*, which allowed the court to decide the case in terms of fairness and reasonableness. In *bonae fidei* contracts, such as sale, fraud could automatically be raised as a defence or ground of action.[29] In contracts where no other remedy was available, the defrauded party would be able to raise the special action known as the *actio doli.*[30] The relevance of these instruments may not be immediately apparent, but they subsequently became of vital importance in acting as catalysts for allowing courts to control the enforcement of contracts; for present purposes it is of particular interest that this included testing the substantive fairness of contracts.[31]

2 2 4 2 Restricted contractual capacity

The non-interventionist approach to contracts set out above might be said to reflect the prevailing liberal economic attitudes to the socio-economic structure of the Roman household.[32] The *paterfamilias* had almost unfettered authority and would have been expected to take care of the business interests of the family as part of his duty to protect those under his care.[33] Majority was only attained at the completion of 25 years of age.[34] The contractual capacity of women, even those of age, was severely restricted. Wives were considered to be in the *manus* (literally "hand") of their husbands, while all descendants were under the *patria potestas*, or power of their father.[35]

[29] R Zimmermann "Good Faith and Equity" in R Zimmermann & D Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* (1996) 217 218-219; RW Lee *An Introduction to Roman-Dutch Law* 5 ed (1953) 225.
[30] Lee *Roman-Dutch Law* 225.
[31] See also the discussion of good faith below at 4 2 7 5.
[32] Zimmermann *Obligations* 255-256.
[33] 256.
[34] D 4 4 1; see J Hallebeek "Sacramenta Puberum and Laesio Enormis - The Oath Non Venire Contra by a Minor in Contracts of Sale - According to Some Glossators" (1990) 58 *LHR* 55.
[35] L Schumaker "Slaves in Roman Society" in M Peachin (ed) *The Oxford Handbook of Social Relations in the Roman World* (2011) 589 590.

Only the *paterfamilias* could dispose of the *patrimonium* of the Roman family, and he held this power until his death over his wife and descendants even after their coming of age.[36] Irrespective of their age, those under the *patria potestas* needed the permission of the *paterfamilias* to enter into any contract.[37]

The *paterfamilias* had formal control over all the legal relationships entered into by his household.[38] Where his consent was absent, he had at his disposal special remedies enabling him respectively, to block a *condictio* seeking the repayment of loaned money, to avoid the manumission of a slave by someone less than thirty years of age, or to avoid the alienation of certain kinds of property.[39]

While still full Roman citizens, children and women were in legal terms, like slaves, considered to be *alieni iuris*, and without legal self-determination.[40] Slaves were under the power of their masters (*potestas dominorum*), and consequently were legal objects and not legal subjects.[41] Women were only to a limited extent able to conduct their own business, and only from the late Roman Republican era onwards.[42] Sons who had been granted a *peculium* (a type of allowance) could engage in trade and enter into contracts, but legally they did not own anything, and would remain subject to the control of the *paterfamilias*.[43]

The *Lex Laetoria,* which was introduced in 192 BCE,[44] is an example of the strong protection granted to minors. The law allowed someone of less than 25 years to recover any inequitable losses arising out of a contract of sale where they were mistaken about the contract price,[45] or where unfair advantage was taken of their inexperience.[46] The minor could negate the enforcement of the contract by raising

[36] 592; see also D 50 16 195 2.
[37] Hallebeek (1990) *LHR* 57.
[38] F Schulz *The Principles of Roman Law* (1936) 145.
[39] Hallebeek (1990) *LHR* 57.
[40] Schumacher "Slaves" in *Social Relations in the Roman World* 590.
[41] 591.
[42] K Milnor "Woman in Roman Society" in *Social Relations in the Roman World* 609 613.
[43] J Krause "Children in the Roman Family and Beyond" in *Social Relations in the Roman World* 623 630; S Dixon "Family" in *Roman Law and* Society 461 464-465.
[44] See 2 3 1 below.
[45] Baldwin (1959) *TAPS NS* 18.
[46] Hallebeek (1990) *LHR* 55.

the *exceptio legis Laetoriae*,[47] or if the contract were already performed recoup his losses through the extraordinary praetorian remedy of *restitutio in integrum*.[48]

2 2 4 3 Limitations imposed by custom and duty

As has been illustrated above, classical Roman law gave great freedom of contract to a small subsection of the population, while it was severely restricted for the rest. Schulz argues that the liberty on which Roman law granted to this subsection of the population was only possible because of the inherent limitations in the Roman conception of liberty;[49] Roman law needed to be liberal in character because of the influence and power of the extra-legal restriction already in place in Roman society.[50] These extra-legal standards play a role even in modern legal systems, but tend to play a far more prominent role in less developed communities where law, religion, and morals are usually tightly interwoven.[51]

We see for example that even in classical Roman law, the abuse of law was not permitted, even if it was not expressly forbidden.[52] As indicated earlier, the *exceptio doli generalis* was recognised in Roman law as a mechanism to prevent the abuse of legal rules.[53] Classical Roman law might thus have allowed parties to conclude a harsh bargain, but an exceptionally harsh one might have been remedied by the *exceptio.*

The restrictions imposed on Roman citizens by societal norms such as *pietas*, *fides*, *humanitas*, and *officium*, to which can be referred to together as the *officia* or duties, played a powerful and active role in the daily lives of Romans.[54] Romans were "enmeshed in a web of societal restrictions", the influence and force of which are difficult to understand from a modern perspective.[55] They were greatly dependent on their relatives, in-laws, friends, patrons, and the general public. This had the effect

[47] 55.
[48] Baldwin (1959) *TAPS NS* 18.
[49] To paraphrase Schulz *Principles* 140.
[50] 21.
[51] See Zimmermann *Obligations* 706-709.
[52] Schulz *Principles* 159.
[53] 157.
[54] See Schulz *Principles* 158; Zimmermann *Obligations* 350, 351 (making a similar point in relation to *locatio conductio*).
[55] Schulz *Principles* 21.

that the extra-legal customs dictating their daily lives were often more powerful than any judicial ruling.[56]

While custom could not overrule existing law, Constantine would later rule that custom could be considered a subsidiary source of law, a decision which was apparently prompted by the fact that custom was at times indeed permitted as a source of law in the Roman provinces.[57]

Plescia has made a similar argument, noting that as post-classical Roman law evolved from status to contract, the emancipation of individuals from family groups coincided with an increase in public authority.[58] So for example the *patria potestas*, declined as the power of the public authority grew, to the extent that it was all but irrelevant by the time of Justinian.[59] It might therefore be no coincidence that rules which restricted the contractual freedom of contracting parties, came into existence at the same time that other limitations imposed by custom and duty started falling away.

2 2 5 Conclusion

The view that classical Roman law was simply not concerned with questions of contractual equity seems at the least, to be incomplete. If anything the law of contract could afford to be less concerned with equity because of the manifold restrictions already in place.

It can be argued that due to the economic and societal constraints outlined above, the class of citizenry engaging in complex contractual exchanges would have been much narrower in classical Rome than in modern society. Determination of price could thus be left to the parties, because it was part of the duty of the *paterfamilias* to invest himself in his own interests, and to protect the economically, socially, intellectually, and emotionally weaker members of society.[60]

One should also be cautious when attempting to compare legal institutions and reasoning between Roman law and the modern law of contract, as Roman law

[56] 22.
[57] J Plescia “The Development of the Doctrine of Boni Mores in Roman Law” (1987) 34 *RIDA* 265, 272-273.
[58] 266-268
[59] 267-268.
[60] Zimmermann *Obligations* 256.

cannot be understood without an appreciation of the extra-legal institutions which accompanied it.[61] This has the effect that Roman private legal institutions often appear far more liberal than what they really were when the other limitations are taken into account.[62]

2 3 Post-classical Roman law: The Lex Secunda

2 3 1 The origin of the Lex Secunda

In contrast to the Roman Republic, where the formal control of price was limited to matters such as the price of grain,[63] the late Roman Empire developed into a highly regulated and controlled economy, possibly due to a series of internal and external crises.[64] It is in this era that a fair price rule first entered Roman law.

It is within book four, subsection 44 of the *Codex Justinianus,* under the heading *De rescindenda venditione* (On the rescission of a sale) that the rule usually referred to as C 4 44 2, or as the *Lex Secunda* is found. It is contained in a rescript, attributed to the emperors Diocletian and Maximian in the year 285 CE:

> *Rem maioris pretii si tu vel pater tuus minoris pretii, distraxit, humanum est, ut vel pretium te restituente emptoribus fundum venditum recipias auctoritate intercedente iudicis, vel, si emptor elegerit, quod deest iusto pretio recipies. Minus autem pretium esse videtur, si nec dimidia pars veri pretii soluta sit.*
>
> "If you or your father sold property worth a higher price for a lower price, it is equitable that either you get back the land sold through a court order, refunding the price to the purchasers, or, if the buyer chooses, you get back what is lacking from the just price. The price is deemed to be too low if less than half of the true price has been paid."[65]

2 3 2 The functioning of the Lex Secunda

The *Lex Secunda* was a rescript dealing with a specific legal dispute involving a certain Aurelius Lupus,[66] and it is usually argued that it was therefore not supposed

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[61] Schulz *Principles* 24.
[62] 31.
[63] The price of grain is a prime example. Throughout its history the city of Rome was constantly threatened by a shortage of food, and grain in particular. After the Gracchan Reforms, grain purchased from abroad by the Roman Senate would be sold at half of the market price to the public. The price of grain would increasingly become a highly politicized matter, and as such would often be controlled or manipulated. See Baldwin (1959) *TAPS NS* 16-17 quoting Livy *Ab Urbe Condita* 2 34; see L de Ligt "Roman Law, Markets and Market Prices" in *Roman Law and* Society 660 667-668.
[64] Baldwin (1959) *TAPS NS* 16.
[65] Translation from R Westbrook "The Origin of *Laesio Enormis*" (2008) 55 *RIDA* 39 40.
[66] See Zimmermann *Obligations* 262.

to constitute a general rule or legal principle.[67] However, this text laid the foundations of a doctrine which the glossators termed *laesio enormis,*[68] and which would be used in a variety of circumstances to adjust a lack of equilibrium in performances or, to put it differently, to ensure that a fair price is paid.[69]

Before these developments are discussed, it is necessary to first consider in greater detail the ambit of the *Lex Secunda*. From the text it is apparent that it only applied to contracts for the sale of land, and would accordingly not apply to other commercial contracts (e.g. lease or loans), or to the sale of movables. The remedy was available only to the seller, who had been inequitably impoverished through receiving an inadequate contract price, and not to a buyer who had paid an excessive price.[70] However, the buyer had the election to pay up to the full just price in order to avoid rescission of the contract.

The one-sided protection granted by the remedy, (and one-sided election) may well be explained by the contemporary economic challenges of the late Roman Empire. The aim of the law was presumably to protect owners of farmland, forced to sell due to dire economic circumstances. The collapse in the price of land coupled with severe inflation in the cost of commodities experienced during the reign of Diocletian,[71] or perhaps the harsh tax regime of Justinian,[72] allowed unscrupulous purchasers to exploit the dire circumstances of the smallholders in order to buy their land at well below market price.[73]

The theoretical and practical shortcomings of the remedy become clear when considering some examples. Consider the sale of several identical plots of land, all with a *iustum pretium* adjudged to be exactly 100 *denarii*. A landowner who receives 51 *denarii* would have no recourse as more than half of the just price has been paid. In contrast to this position a landowner receiving 49 *denarii* would have this remedy

[67] Zimmermann *Obligations* 259.
[68] See T Finkenauer "Laesio Enormis" in J Basedow, KJ Hopt, R Zimmermann & A Stier (eds) *The Max Planck Encyclopedia of European Private Law* II (2012) 1029.
[69] Zimmermann *Obligations* 262; Hallebeek (2015) *Fundamina* 19; see 2 4 1 1 below.
[70] Baldwin (1959) *TAPS NS* 18.
[71] Westbrook (2008) *RIDA* 44.
[72] Zimmermann *Obligations* 260, 261; J Hallebeek "De Iustum Pretium-Leer en het Evenredigheidsbeginsel" in L van der Berge, M Neekilappillai, R Kindt, & J Valk (eds) *Historische Wortels van het Recht* (2014) 3; see also HR Hahlo & E Kahn "Two Important Changes in the Common Law" (1952) 69 *SALJ* 392 392; see also the discussion at 2 3 3 below.
[73] JW Wessels *History of the Roman-Dutch Law* (1908) 608.

at his disposal, and would thus be able to seek relief under the *Lex Secunda.* Depending on the election of the buyer, the latter seller of land may receive the *iustum pretium* in full, while the former has no recourse at all despite being impoverished to an almost identical extent.

The election of the purchaser to some extent mitigates this position, as the purchaser may choose to rescind the sale rather than pay the full just price; this position is however not unproblematic either. As the choice lies solely with the purchaser, he is able to escape situations where his actions have led to an inequitable result. One could even argue that this leaves little incentive for the purchaser to offer a just price, as he could, at the worst, elect to be restored to the position *ex ante.*

There is also an element of arbitrariness in the all-or-nothing nature of the remedy. No position of compromise is possible where, for example, the purchaser agrees to reimburse the seller anything less than the full amount. Of course any objective measure would contain some level or arbitrariness, whether the parties were reimbursed in full or not, or whether the inequitable but still acceptable purchase price is one half, two-thirds or five-twelfths of the *iustum pretium.*[74] These examples all seek to prove the rigidity and bluntness of the *Lex Secunda*.

We also have very little evidence of what the measure or guideline for the calculation of the *iustum pretium* would have been when applying the *Lex Secunda*. This question would lead to much fervent debate and much controversy in the centuries to follow.[75]

2 3 3 Potential influences on the Lex Secunda

There is some doubt about the authenticity of the *Lex Secunda*. Some scholars argue that it was not an invention of Diocletian, but rather a Justinianic interpolation.[76]

[74] A Watson "The Hidden Origins of Enorm Lesion" (1981) 2 *JLH* 186 189; Zimmermann *Obligations* 270.
[75] See the discussion below regarding just price in canon law at 2 4 2 3 2; see also the discussion of market price as the fair price in 5 2 1 4 below.
[76] Zimmermann *Obligations* 259; Baldwin (1959) *TAPS NS* 18; C Becker *Die Lehre von der Laesio Enormis in der Sicht der Heutigen Wucherproblematik* (1993) 11; Westbrook (2008) *RIDA* 41; Baldwin

The Roman Empire was undergoing considerable change during this era. Early in the third century Roman citizenship had been expanded (with some exceptions) to the whole free population of the Empire. This had the effect that many people formerly governed by local (especially Greek) laws were now suddenly governed by Roman law.[77] While the foundations of early Roman law do not contain much Greek influence, the laws of the late Roman Empire were greatly influenced by Greek laws, customs, and philosophy.[78] Constantine moved the imperial capital to Byzantium, and Christianity became the state religion. With a new religion came a new system of ethics, one that was often at odds with the individualistic nature of classical Roman law.[79]

In this light the *Lex Secunda* is viewed by some as an attempt by Justinian to infuse his laws with Christian values.[80] Becker also stresses that the inclusion of the doctrine in the Codex might have resulted from a combination of urgent socio-political needs of the period, coupled with Justinian's adherence to Christian moral doctrine.[81] In this framework the *Lex Secunda* can be regarded as a compromise between the liberal classical Roman legal position, and Stoic-Christian moral principles which assumed a just price theory.[82]

It is also likely that Roman law came to be influenced by sources far more Eastern than just Greece, or the broader Hellenic world.[83] Baldwin notes the close similarity between the *Lex Secunda* and the legal doctrine of *ona'ah* in Talmudic *Mishnah* (Rabbinic Law).[84] According to the doctrine of *ona'ah*, translated by Westbrook to mean "overreaching or price fraud", a contract could be rescinded if the contract price

(1959) TAPS 17; A Watson *The Spirit of Roman law* (1995) 176-177. In contrast to some of the sources cited above, modern scholarship seems to cast doubt on the idea that the text was necessarily a Justinianic interpolation: see Finkenauer "Laesio Enormis" in *Max Planck Encyclopedia* 1029; Koops "Price Setting" in *Roman Law and* Society 617; L de Ligt "Roman Law, Markets and Market Prices" in *Roman Law and* Society 660 667.

[77] WW Buckland *The Main Institutions of Roman Private Law* (1931) 21.

[78] 20, 21.

[79] 22.

[80] See J du Plessis & R Zimmermann "The Relevance of Reverence; Undue Influence Civilian Style" (2003) 10 *Maastricht J of European and Comparative Law* 345 352; Van Loo *Vernietiging* 74.

[81] Becker *Laesio Enormis* 13.

[82] Baldwin (1959) *TAPS NS* 19.

[83] 23.

[84] 19.

was more than one-sixth lower than the market price.[85] That the doctrine of *ona'ah* makes use of one-sixth as opposed to one-half should be of little consequence; when such a doctrine is transplanted from one legal culture to another, it is likely that one would impose upon it whichever proportion seems right within a legal culture.[86]

2 3 4 Conclusion

One can speculate on the origins of the fair price doctrine in order to understand its purpose better. However, it is impossible to answer questions as to the proper functioning and scope of application of the doctrine of *laesio* enormis definitively; there is also insufficient proof of the origins of this post-classical innovation presumably aimed at protecting sellers of land.[87] Furthermore, questions as to the origin of the doctrine provide little insight into the substantive merit of such a rule, or guidance as to how it was or should be applied. As these potential outside influences were only discovered much later, they would have little influence on the reception of the rule during the Middle Ages. Watson argues that part of the reason why fair price doctrines were so popular during the Middle Ages, is that this ambiguity inherent in the *Lex Secunda* allowed it to be developed and repurposed for a variety of different ideologies and approaches.[88] As will become apparent in the next section, the rule was received into the revived Roman law during the course of the Middle Ages without any doubts as to its authenticity.

2 4 Iustum pretium in the Middle Ages

2 4 1 The glossators

2 4 1 1 Introduction

After the hiatus sometimes called the Dark Ages, the study of Roman law in Europe began anew, under somewhat mysterious circumstances, in Bologna at about 1100 CE, with the establishment of the legal school called the glossators.[89]

[85] Westbrook (2008) *RIDA* 42; see also M Armgardt "Zur Dogmengeschichte der *Laesio Enormis* - Eine Historische und Rechtsvergleichende Betrachtung" in K Riesenhuber & IK Karakostas (eds) *Inhaltskontrolle in Nationalen und Europäischen Privatrecht* (2009) 3 6-7.
[86] Watson (1981) *JLH* 189.
[87] 186, 189; see 2 2 above.
[88] 192-193.
[89] J Gordley *The Philosophical Origins of Modern Contract Doctrine* (1991) 32; Whitman (1996) *Yale LJ* 1846-1847.

The study of Roman law was organised around the Justinianic *Corpus Iuris* Civilis, which is recognised today as being at times fragmented and contradictory, and the product of a host of different political and social circumstances.[90] The medieval scholars, though not uninterested in history, lacked the historical knowledge about the context of the *Corpus*,[91] and would by contrast have viewed it as a valid and unitary whole,[92] and would therefore attempt to derive general legal principles from the decisions contained in the *Corpus*.[93]

Their understanding of the *Lex Secunda* should also be viewed in this light. They would try to find the meaning of a text by interpreting it with reference to the content of other texts,[94] which often lead to interpretations that can today be cast aside as being spurious or incorrect.[95] This almost blind adherence to the *Corpus* also meant that the glossators did not properly theorise the workings of the fair price rule in the *Lex Secunda;* they simply inferred its operation from other texts available to them.[96]

The discussion above regarding the possible influences on the *Lex Secunda*, as well as the doubts regarding the authenticity of the provision,[97] would have been of no concern to the glossators.[98] The first traces of this debate would only emerge among some of the late scholastics.[99] Similarly, the Aristotelean theory which would later underlie the theological justification for later fair price rules was still absent in their reasoning.[100] Nevertheless as the first great school of Roman law, the glossators do present us with an important link in the story of the transformation of *Lex Secunda* into the doctrine of *laesio enormis*, as the doctrine would come to be known.

The glossators extended the ambit of *Lex Secunda* first to things other than land in the early 12th century, and later to buyers who had paid more than twice the just price

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[90] See H Coing "The Sources and Characteristics of the Ius Commune" (1986) 19 *CILSA* 483 484-485.
[91] See for example, Coing (1986) *CILSA* 485-486 who gives examples of the specious outcomes reached by the "unhistorical thinking" of the medieval scholars.
[92] Gordley *Origins* 32.
[93] Coing (1986) *CILSA* 486.
[94] Gordley *Origins* 30.
[95] See for example the discussion above under 2 3 3; see also Decock *Theologians* 572-581.
[96] Gordley *Origins* 65.
[97] See above 2 3 3.
[98] Gordley *Origins* 30.
[99] See below 2 4 3 3.
[100] Gordley *Origins* 33. See below 2 4 2 3 1.

(as opposed to sellers who sold for less than half the just price), as well as to other analogous contracts, such as lease, in the early 13th century.[101]

They identified the just price with market price.[102] This view stems from their interpretation of the first sentence of D 35 2 63, which reads: "The prices of things are taken not from the desire or utility of individuals but from those of the people commonly."[103] Accursius in his gloss to C 4 44 6 echoes this view, noting that the just price of a thing is not determined by the affection attached to it by a single person, but the common estimation,[104] and is determined at the time of the conclusion of the contract.[105] The just price would therefore differ depending on the time and place of the contract conclusion.[106]

2 4 1 2 Dolus ex re ipsa: fraud flowing from the thing itself

While the glossators lacked a general theory to justify the *Lex Secunda*, they did link the relief granted to the prejudiced party with the relief granted in the case of fraud.[107] Accursius, following on the work of Vacarius and Azo, distinguished between fraud that was causal, leading a person to contract where they otherwise would not (*dolus dans causam contractui)*, and cases where the fraud was incidental, where the party would still have contracted but on different terms, or for a different price (*dolus incidens*).[108]

Fraud is further subdivided into cases where one party deliberately attempts to mislead the other (*dolus ex proposito*), i.e. fraud as it is understood today, and cases where the contracting party was not deceived deliberately, but still contracted on

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[101] 65.
[102] 65.
[103] "Pretia rerum non ex affectu nec utilitate singulorum, sed communiter funguntur." The translation and the citation are from Gordley *Origins* 65.
[104] Accursius Gloss to C 4 44 6 to *non est* at sentence 3: *Item quia affectionem habet in ea venditor: at pretia rerum secundum veritatem, non ex affection singulorum vel utilitate sunt aestimanda;* see also Gordley *Origins* 65.
[105] Accursius Gloss to C 4 44 6 to *non est* at sentence 2: *Item quia res non erat melior facta, quam fuerat tempore contractus.*
[106] Gordley *Origins* 65; J Gordley "Good Faith in Contract Law in the Medieval *Ius Commune"* in R Zimmermann & S Whittaker (eds) *Good Faith in European Contract Law* (2000) 93 102.
[107] Gordley *Origins* 64.
[108] W Decock & J Hallebeek "Pre-contractual Duties to Inform in Early Modem Scholasticism" (2010) 78 *LHR* 89 93-94; Gordley *Origins* 65-66; Gordley "Good Faith" in *Good Faith in European Contract Law* 100, 101; Zimmermann *Obligations* 670-671.

disadvantageous terms. These cases were termed *dolus ex re ipsa*, or fraud flowing from the thing itself.[109]

While these rather technical delineations might have been some of the most influential contributions of the glossators to medieval scholarship,[110] they arose in a wayward attempt to integrate the remedy in the *Lex Secunda* with the other Roman texts.[111] D 45 1 36 states in a rather cryptic passage, that where there is no fraud on the part of one of the contracting parties, but the matter itself contains an element of fraud, the prejudiced party is entitled to an exception, as if he was induced to contract by fraud.[112]

The glossators reading this passage with the *Lex Secunda*, understood *dolus ex proposito* to be present where the party was prejudiced *ultra dimidium* (i.e. where the prejudice exceeded half of the just price).[113] Although the *Lex Secunda* did not form part of classical Roman law, the glossators with their unitary approach to the *Corpus*, and even much later humanist authors, nevertheless followed this mistake due to their ignorance of the historical development of the *Lex Secunda*.[114] Canon lawyers, borrowing this distinction from the glossators, would also incorporate *dolus ex re ipsa* into the Decretals of Gregory IX.[115]

This understanding of the *Lex Secunda* as being related to a type of fraud is important as it would hold credence for centuries. Because of this extraordinary interpretation of the *Lex Secunda*, the glossators were able to create a general legal principle out of a specific legal construct, in effect allowing the remedy to be extended to other analogous contracts. It even allowed the remedy in the *Lex Secunda* to be granted where the contract was one of strict law rather than of good faith.[116]

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[109] Gordley "Good Faith" in *Good Faith in European Contract Law* 101.
[110] Zimmermann *Obligations* 670.
[111] Gordley "Good Faith" in *Good Faith in European Contract Law* 101, 102; Decock & Hallebeek (2010) *LHR* 94.
[112] See specifically the sentence of D 45 1 36: "*quia enim per dolum obligatus est, competit ei exception. idem est et si nullus dolus intercessit stipulantis, sed ipsa res in se dolum habet* …"
[113] Gordley "Good Faith" in *Good Faith in European Contract Law* 102; Hallebeek (2015) *Fundamina* 22.
[114] Decock *Theologians* 574-575.
[115] Gordley "Good Faith" in *Good Faith in European Contract Law* 102.
[116] 102.

It would only be pointed out much later by the late scholastic Arias Piñel that since the *Lex Secunda* did in fact not form part of classical Roman law,[117] it is illogical to try and understand it by relating it to a text from the classical period.[118] D 45 1 36 could not have been referring to the *Lex Secunda* as these two texts are separated by hundreds of years. As is discussed below, a proper theoretical justification of the *Lex Secunda* would only emerge in canon law.

It is also interesting to note at this stage that some glossators denied the remedy to the disadvantaged party if they knew the "true value" of the *merx* at the time of contract conclusion.[119] In line with the maxim, *quia scienti et violenti non fit iniuria*, contracting parties who knew the value of the *merx* could hardly be said to have been defrauded.[120] Whatever the case might have been in the Roman empire, even the earliest students of Roman law did not view the *Lex Secunda* as a remedy based solely on objective disparity in the value of the respective performances, but rather denied the remedy to those parties that freely consented to buying at an unfair price.

2 4 2 Medieval canon law.

2 4 2 1 Introduction to canon law

Considering the weak foundation of the *Lex Secunda,* and how unconventional it was doctrinally, it may be questioned how it came to be that it was not only received into modern law, but was in fact greatly expanded during the Middle Ages.[121] Why was it not cast off and abandoned like many of the other eccentricities contained in the *Corpus Iuris Civilis*? For this answer one must look towards canon law, where the idea of a fair price rule was held in higher regard than ever before or since. The survival of the *iustum pretium* rule is largely attributable to the fondness that canon

[117] See the discussion below at 2 4 3 3.
[118] See Decock *Theologians* 573-575.
[119] See Kalb *Laesio Enormis* 115.
[120] See 167. Some late scholastics like Johannes de Lugo, argued however that *quia scienti et violenti non fit iniuria* could only be a valid argument where the voluntariness was not mixed with some form of involuntariness, i.e. where there are no defects in consent.
[121] For a discussion of the expansion and development of the *iustum pretium* see Zimmermann *Obligations* 262; Van Loo *Vernietiging* 74-75.

law, which was greatly attached to good faith, had for the doctrine of *iustum pretium*.[122]

As noted above, the *Lex Secunda* was already expanded during the early medieval era to be available to both the buyer and the seller;[123] to the sale of land as well as other immovables such as houses, and to movables;[124] to contracts of sale, as well as all manner of analogous contracts,[125] and to both *bonae fidei* and *stricti iuri* contracts.[126] Since the *Lex Secunda,* originally encompassed a much narrower field of application, and referred to a specific rescript rather than to a legal principle, it was hardly appropriate to refer to the rule as such anymore. The fair price rule would from the beginning of the thirteenth century be referred to as the doctrine of *laesio enormis*, which literally means a "very large hurt".[127] This expansion of the *Lex Secunda* was nothing less in substance than an adoption of a general principle of proportionality of reciprocal performances.[128]

2 4 2 2 Iustum pretium and the doctrine of restitution in canon law

The views of the medieval theologians differed from that of the contemporary Romanists and the Canonists on the issue of just price. The Romanists and Canonists, who largely followed Roman law, believed that inadequacy of price which fell short of the threshold for *laesio enormis* did not invalidate a contract.[129]

Theologians of the 12th and 13th century, however, adopted a far stricter approach. The doctrine of restitution developed by medieval theologians, held that every disturbance of the natural order had to be restored,[130] and accordingly did not allow

[122] RWM Dias "Laesio Enormis*:* The Roman Dutch Story" in D Daube (ed) *Studies in Roman Law of Sale* (1959) 46 47.
[123] Gordley & von Mehren *Private Law* 462; Wessels *History* 609; Van Loo *Vernietiging* 74; Hallebeek "De Iustum Pretium leer" in *Historische Wortels* 6; Zimmermann *Obligations* 262.
[124] Van Loo *Vernietiging* 74; Hallebeek "De Iustum Pretium leer" in *Historische Wortels* 6; Zimmermann *Obligations* 262.
[125] Gordley & von Mehren *Private Law* 462; Van Loo *Vernietiging* 74; Zimmermann *Obligations* 262; Decock & Hallebeek (2010) *LHR* 91 93.
[126] Van Loo *Vernietiging* 75; Hallebeek "De Iustum Pretium leer" in *Historische Wortels* 6; Wessels *History* 610.
[127] See Gordley & von Mehren *Private Law* 462; Van Loo *Vernietiging* 74.
[128] Hallebeek (2015) *Fundamina* 21.
[129] Baldwin (1959) *TAPS NS* 69.
[130] Hallebeek "De Iustum Pretium leer" in *Historische Wortels* 4; Decock & Hallebeek (2010) *LHR* 93.

contract price to diverge from the just price to the same extent; "divine law demanded restitution even if the mistake were a penny".[131]

The conventional view is that the doctrine of restitution was not meant to be applied to everyday life. The doctrine operated in terms of divine law (*lex divina*) and the laws applied to the celestial court (*ius poli),* and primarily found application in the *forum internum,* i.e. the realm of conscience,[132] in contrast to laws applied by the civil court (*ius fori*) and the civil law or human law (*lex humana*), which were more generous in allowing parties to determine the price in everyday commercial practice.[133]

Indeed it seems that in decisions dating to 1170 and 1208 CE, canon law courts still followed the position of the late Roman law; parties were free to determine the contract price as long as the disproportion between price and performance did not exceed the ratio or threshold of two to one used by the doctrine of *laesio enormis*.[134] This would progressively change through the course of the 13th century. A papal decree in 1204 by Innocentius III allowed judges to apply the doctrine of restitution directly through a special procedure in the *forum externum*.[135] Versions of the doctrine were included no less than twice in the *Decretum Gregorii IX* (also referred to as the *Liber Extra*).[136] Canon law judges were now able to provide far greater assistance to a prejudiced party through the doctrine of restitution than civilians could under the *Lex Secunda.*[137]

This development is important because it presented a conundrum for medieval civilians. If they remained true to Roman law they would be able to grant relief to a prejudiced party in far fewer cases than the ecclesiastical courts. Faced with this challenge, civilian jurists purposefully misinterpreted Roman texts in order to provide protection to the prejudiced party and thereby "save the face" of Roman law.[138] When

[131] Baldwin (1959) *TAPS NS* 69.
[132] Hallebeek (2015) *Fundamina* 17.
[133] Hallebeek "De Iustum Pretium leer" in *Historische Wortels* 4-5; Baldwin (1959) *TAPS NS* 72.
[134] Hallebeek "De Iustum Pretium leer" in *Historische Wortels* 5.
[135] 5.
[136] See *Decretum Gregorii IX* 3 17 3, 3 17 6; see Hallebeek "De Iustum Pretium leer" in *Historische Wortels* 5; Dias "Laesio Enormis" in *Roman Law of Sale* 47.
[137] Hallebeek "De Iustum Pretium leer" in *Historische Wortels* 5.
[138] Hallebeek (2015) *Fundamina* 21; see also G Dolezalek "The Moral Theologians' Doctrine of Restitution and its Juridification in the Sixteenth and Seventeenth Centuries" (1992) *Acta Iuridica* 104-105.

seeking relief in canon law, the point of departure was not to look as in Roman law, for an action that falls within one of the categories of actions, or procedures available to the prejudiced contracting party. Restitution in canon law was based on a divine law with universal application.[139]

This allowed for a much more general and flexible scope of application that was able to offer restitution where the civil law could not do so.[140] The extensive development, the expanding really,[141] of the *Lex Secunda* during the Middle Ages,[142] and the transformation into a principle of proportionality, can thus be viewed in part as an attempt at competing for legitimacy with canon law.[143]

Why was canon law so fond of the *iustum pretium* doctrine, and broadly speaking of restitution? This fixation has its roots in the seventh commandment, the command not to steal.[144] Receiving anything more than one was due was a form of theft that theologians sought to avoid at all costs.[145] Restitution in canon law refers to those situations in which a moral, and therefore sometimes also a legal duty, arises to return a thing.[146] Theologians defined the recovery of equality in exchange, i.e. the recovery of an amount over or underpaid, as a form of restitution:[147] One who did not make restitution to the true owner of what he took away, could not achieve penitence and the remission of his sin.[148]

2 4 2 3 The development of the doctrine of laesio enormis by Thomas Aquinas and Albertus Magnus

Despite the fact that the notion of a *iustum pretium* formed part of both Roman and Talmudic law,[149] most modern studies of the *iustum pretium* doctrine inevitably centre

[139] J Hallebeek *The Concept of Unjust Enrichment in Late Scholasticism* (1996) 20.
[140] Decock *Theologians* 514-515; Hallebeek *Unjust Enrichment* 21; Hallebeek "De Iustum Pretium leer" in *Historische Wortels* 4.
[141] See in this regard Hallebeek *Unjust Enrichment* 41-45.
[142] In this regard see the discussion above at 2 4 2 2; Gordley & von Mehren *Private Law* 462; Zimmermann *Obligations* 262.
[143] Hallebeek (2015) *Fundamina* 21; Hallebeek "De Iustum Pretium leer" in *Historische Wortels* 6.
[144] Hallebeek *Unjust Enrichment* 19; Decock *Theologians* 514.
[145] Decock *Theologians* 514.
[146] Hallebeek *Unjust Enrichment* 19.
[147] Decock *Theologians* 514.
[148] 514.
[149] See above 2 3 3; see also Watson (1981) *JLH.*

on the medieval theologian Thomas Aquinas.[150] This might be because of the great influence Aquinas had on canon law, and the early modern scholastic tradition,[151] and also because he may have been the first to discuss certain questions regarding the nature of a just price at length.[152]

Despite the influence attached to these ideas, Aquinas never developed a clear *iustum pretium* rule or doctrine.[153] This has given rise to considerable confusion and debate about his views. The passages where Aquinas does deal with just price are scattered over his *Summa Theologica*, and his commentary on Aristotle's *Nichomachean Ethics.* Depending on which passage is referred to, varying, and often contradictory, interpretations could arise.[154]

The fragmented nature of his writing on just price has allowed some writers only to select those passages which are favourable to, or suitable for their theses.[155] The argument whether Aquinas conceptualised the just price as an objective price based on production costs, or as a subjective market-oriented price based on fluctuations in scarcity and need, has been especially contentious. The former view has been espoused by some who wish to cast Aquinas as supporting a (Marxist) labour theory of value;[156] and by others, who even today mischaracterise the medieval notion of a just price as a metaphysical or objective value inherent in a thing,[157] in order to refute it more easily. As will become apparent later, the question on what should be the measure of a just price remains contentious to this day.[158]

2 4 2 3 1 How Aquinas justified a iustum pretium rule

The works of Aristotle on metaphysics, politics and ethics were rediscovered shortly before the birth of Aquinas, and had a monumental impact on the intellectual community in these fields, comparable to that of Darwin or Newton in the natural

[150] See Baldwin (1959) TAPS 72.
[151] See Decock & Hallebeek (2010) 97.
[152] See Baldwin (1959) TAPS 70.
[153] R de Roover "The Concept of the Just Price: Theory and Economic Policy" (1958) 18 *J Econ Hist* 418 421; see also Baldwin (1959) *TAPS NS* 20.
[154] Roover (1958) *J Econ Hist* 421; see also Baldwin (1959) *TAPS NS* 20.
[155] De Roover (1958) *J Econ Hist* 421.
[156] See Baldwin (1959) *TAPS NS* 7, 76; De Roover (1958) *J Econ Hist* 421.
[157] See A Perrone "The Just Price Doctrine and Contemporary Contract Law: Some Introductory Remarks" (2014) 125 *Rivista Internazionale di Scienze Sociali* 217 222-223.
[158] See 5 2 1 below.

sciences.[159] The philosophy of Aristotle provided Aquinas and his contemporaries with the necessary principles, theories, and justifications to solve numerous problems posed by Roman law.[160]

Aquinas attempted to follow Aristotle in classifying justice into several different types, the most important of which for our discussion is the category of commutative justice,[161] which features prominently in Aquinas's justification of a just price doctrine. Commutative justice is not concerned with redistribution of wealth, as this lies in the domain of distributive justice, which sought to ensure that everyone received their fair share of whatever wealth exists in society.[162] Commutative justice, according to Aquinas is rather concerned with preserving the share of wealth which individuals owned. In exchange people should accordingly give something of equal value to what they receive, so as to not enrich or impoverish either party.[163]

Aristotle argued that in a society based on the division of labour, the exchange of unlike goods between people of unlike professions becomes a necessity.[164] The division of labour (and accompanying specialisation) inevitably leads to interdependence. Equality in exchange is essential to ensure the continued existence of such a society; if the shoemaker does not receive adequate value for his goods, he will have no incentive to continue producing shoes,[165] but society would still require shoes. It is this conundrum that led Aristotle to propose his theory of "just reciprocation in the exchange of goods".

Aquinas following on the views of Aristotle argued that since contracts of exchange are established for the common advantage, they should observe equality of value in the things exchanged between the parties. To sell a thing for more than it

[159] Gordley *Origins* 3.
[160] 3.
[161] See J Finnis *Aquinas: Moral, Political, and Legal Theory* (1998) 187-188, 215. Aquinas' category of "commutative justice" can be compared to Aristotle's category of "corrective justice". See for example Baldwin (1959) *TAPS NS* 62, who states when discussing the classification of Aquinas that: "Commutative justice, derived from the word *commutatio* or transaction, was clearly the same as Aristotle's corrective (*directivum*) justice."
[162] Gordley "Good Faith" in *Good Faith in European Contract Law* 106.
[163] 106.
[164] Hallebeek "De Iustum Pretium leer" in *Historische Wortels* 11.
[165] 11.

is worth, or to buy for less than it is worth, is therefore unjust and unlawful as it is contrary to commutative justice.[166]

As a theologian, Aquinas also drew on divine authority to justify a fair price rule. He referred to the golden rule of the Gospel: "Do unto others what you would have them do unto you."[167] Since no-one wishes to pay an unfair price, one should therefore also not sell at an unfair price.[168] Despite its religious origin, such a rule does not seem too far removed from the modern conceptualisation of a duty to act in good faith, at least to the extent that it requires mutual respect and consideration. Such a rule was also recognised by the Medieval civilians, who held as a general principle of good faith that there should be no deceit or overreaching.[169]

2 4 2 3 2 How is a just price to be determined?

Just reciprocation depends on some measure of value by which all things can be compared. For Aristotle this measure was "need" or "demand" (transliterated as "*chreia"*). The builder of a house satisfies a greater *chreia* than the shoemaker, and accordingly a house is worth more than a pair of shoes.[170]

As the need for a certain thing might fluctuate depending on the circumstances, this conception of value can be considered subjective; as opposed to, for example, a conception of value which holds that all things have a certain intrinsic value.

While Aristotle does not provide a wholly satisfactory answer as to how to convert the abstract principle of need into a concrete measure, Aquinas states that the device of money was invented to give a numerical representation for need.[171] An exchange in line with the principle of reciprocation would therefore be an exchange where the respective performances satisfied a proportionally equal amount of *chreia*.

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[166] See Aquinas *Summa Theologica* 2 2 77 1; see also Perrone (2014) *Rivista Internazionale di Scienze Sociali* 219.
[167] Baldwin (1959) *TAPS NS* 72-73.
[168] 73.
[169] Gordley "Good Faith" in *Good Faith in European Contract Law* 102; see also the discussion of good faith below at 4 2 7 5.
[170] See Baldwin (1959) *TAPS NS* 12.
[171] 12, 74.

Aquinas and his mentor Albertus Magnus, following the arguments of Aristotle, also believed that human need (*indigentia*) was the measure of a thing's value.[172] Aquinas also took the view that value does not come from the intrinsic quality of a thing, as it is impossible to divine an objective value solely from the properties of a thing.[173] In turn the manifestation of need is preference (*praeeligere*), and as such "need" is in this context synonymous with "demand".[174] Albertus measured *indigentia* through the factor of utility (*utilitas*), i.e. how useful a thing was in satisfying a need.[175]

Where Aquinas and Albertus did introduce new arguments was through adding a second basis for the measuring of value, namely the labour and expenses involved in the production of a thing.[176] This added a more objective basis to the formerly subjective assessment of value. Depending on the subjective need for a thing, a common pair of shoes could (theoretically at least) have higher value than a house; but viewed more objectively, by taking into account the labour and expenses involved in the production of the respective things, it normally could not.

Aquinas and Albertus adapted the reasoning of Aristotle to justify the inclusion of this second basis for value; arguing that members of society would only engage in trade if they were justly remunerated for labour and expenses incurred by them.[177] This does not necessarily mean that the just price and the cost of production had to be one and the same. Interpreted another way, this argument could simply mean that the market price for a thing should not permanently fall below the cost of production.[178]

The importance attached by Aquinas to labour and expenses should be situated within the importance historically attached to these factors by the Christian church,[179] as well as the scepticism the church displayed towards traders and merchants in its early years.[180] In his earlier work Aquinas at times comes close to stating that the

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[172] 74.
[173] 74.
[174] Finnis *Aquinas* 201.
[175] Baldwin (1959) *TAPS NS* 74.
[176] 74.
[177] 75.
[178] De Roover (1958) *J Econ Hist* 422.
[179] Baldwin (1959) *TAPS NS* 76-77; see also also R Kaulla *Die Geschichtliche Entwicklung der Modernen Werttheorien* (1906, reprint 1977) 52-54.
[180] Baldwin (1959) *TAPS NS* 12-15.

exchange of commodities should be based on the amount of labour expended on the respective articles.[181]

Some scholars in the first half of the 20th century therefore argued that the second basis introduced by Aquinas, that of labour and expenses, was intended to subsume the first subjective basis.[182] Much of this scholarship sought to characterise Aquinas as a type of proto-Marxist.[183]

However, especially in his late writing, Aquinas expressed views clearly favouring the current price.[184] The term "current price" should be understood as the price the *merx* would currently fetch in the market between willing buyers and sellers, at a certain time and place, under free and competitive conditions.[185] Aquinas held, for example, that it was permissible to sell a thing for more than its worth, if both parties subjectively attached a higher value to a thing.[186] By contrast, the buyer's willingness to pay more, for example due to a pressing need, does not justify that the seller charges a higher price than the current price.[187] Aquinas also admitted that the just price of a thing is not fixed, but depends on an estimate and therefore changes within a certain range or band.[188] Albertus Magnus also favoured such a view, defining the just price as: "What goods are worth according to the estimation of the market at the time of sale."[189]

These views align much better with conception of a just price as a type of market price, and according to both Baldwin and De Roover logically exclude a theory of just price based exclusively on production costs.[190] The consensus among more recent

[181] See De Roover (1958) *J Econ Hist* 421 n 17; Aquinas *Commentary to Nichomean Ethics* 5 7-5 9.
[182] Baldwin (1959) *TAPS NS* 75; see also Gordley & von Mehren *Private law* 463.
[183] De Roover (1958) *J Econ Hist* 422.
[184] See Baldwin (1959) *TAPS NS* 78-79 for a discussion on the possible development of the views of Aquinas.
[185] See Baldwin (1959) *TAPS NS* 76, Finnis *Aquinas* 202.
[186] See Finnis *Aquinas* 202.
[187] See Finnis *Aquinas* 202, 206; De Roover (1958) *J Econ Hist* 426; Van Loo *Vernietiging* 36. Where both the seller and the purchaser place a higher value on the *merx*, but the seller more so than the purchaser, no sale would occur as the parties would not agree on a price; see Aquinas *Summa Theologica* 2 2 77 1.
[188] See Perrone (2014) *Rivista Internazionale di Scienze Sociali* 219; Aquinas *Summa Theologica* 2 2 77 1 1.
[189] Albert Magnus *Commentarii in IV sententiarum Petri Lombardi* 16 46 29 from De Roover (1958) *J Econ Hist* 422.
[190] See Baldwin (1959) *TAPS NS* 78; De Roover (1958) *J Econ Hist* 422.

scholars thus seems to be that Aquinas viewed the just price as the price which a good would currently be worth in the market.[191]

So, if the market price is the just price, what would Aquinas consider an unjust price? It seems that those prices where the advantaged contracting party exploited a particular weakness of the disadvantaged party, a so called *pretium affectionis*, were considered unjust.[192] This could include price induced by fraud, price discrimination, or monopoly profits.[193] It has already been noted that the seller was not allowed to sell a thing for more than it was worth to him, so there was still an upper limit to the price he could ask.[194] It has also been argued that a market price which falls permanently below the cost of production would be an unjust price, so there is a lower limit as well.[195]

It can thus be inferred, rather unsatisfactorily to those wishing to place Aquinas on either side of the spectrum, that the just price of Aquinas was neither completely subjective (in the sense of being dependant only on the subjective estimation of a person as to the worth of a thing) nor objective (in the sense that the actual cost incurred were decisive, or that it was reliant in some intrinsic value), but rather something in between; it was determined with reference to several considerations, of which the main determinant was the market price.

2 4 3 Towards the late scholastics and natural lawyers.

2 4 3 1 Introduction

During the 16th and 17th centuries a school of jurists situated in Spain made a conscious attempt to synthesise Roman law with the moral theology of Aquinas.[196] The different schools of medieval law thus came together with these Spanish late scholastics, and many fundamental concepts and doctrines of modern private contract law descend from the synthesis they achieved.[197]

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[191] Perrone (2014) *Rivista Internazionale di Scienze Sociali* 219.
[192] Baldwin (1959) *TAPS NS* 80.
[193] 80.
[194] See n 187 above.
[195] See n 178 and accompanying text.
[196] Gordley *Origins* 3.
[197] 3.

The late scholastics found it easy to integrate Roman law with the idea of Aquinas that commutative justice required equality in exchange.[198] Roman law already provided the remedy in the *Lex Secunda,* and, following the teaching of Aquinas, the scholastics argued that while the commutative justice required equality, pragmatic concerns dictated that only large deviations could be remedied.[199] In addition to the arguments which they inherited from Aquinas, the late scholastics also justified the *iustum pretium* doctrine by way of the "do no harm" principle expressed in D 1 1 1-1 1 3, which can be paraphrased as the intent to "give everybody his right, to do no harm (*neminem laendere)*, and to live honestly."[200]

2 4 3 2 What did the late scholastics understand by a "just price"?

Like their Romanist and theologian predecessors, the late scholastics by and large viewed the just price as the market price, free of collusion or artificial restriction of supply.[201]

This is evidenced by the fact that prominent scholastics such as Leonard Lessius and Juan de Lugo justified and defended extremely liberal (and market-oriented) commercial practices, such as insider trading through use of the *iustum pretium* doctrine.[202] In the case of a trader who had inside knowledge of the fact that a ship carrying spices to a town had sunk, Lessius held that he was not prohibited from using this insider knowledge to his advantage, by for example buying up all the spice in town at the current market price, and then selling it at a much higher price in future.[203] While the merchant had profited by buying and selling at two different prices, he had done so both times at the prevailing market price, and thus at the just price.[204] A fair price rule would also not have precluded a merchant from receiving great profits in the sale of his wares, if he were, for example, able to produce his wares at a rate much lower than the prevailing market price.[205]

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[198] 94.
[199] 94.
[200] Translation from Decock *Theologians* 570.
[201] Gordley *Origins* 94-95; Eligedo (2009) 90 *JBE* 32.
[202] Decock *Theologians* 592-94.
[203] See Lessius *De Iustitia et iure* 2 21 5 46 from Decock *Theologians* 594.
[204] Decock *Theologians* 594.
[205] Eligedo (2009) *JBE* 35.

These examples logically exclude the view that the just price is a function of the intrinsic value, or production costs of a thing, and also necessitate that modern scholars reassess the view that a market-oriented just price doctrine would necessarily impede free-market practices.[206] The late scholastics also did not view the *iustum pretium* as a single discrete price, but rather believed that any price which fell within a certain range, reflecting the fluctuation of need and scarcity, could be considered just.[207] Allowing a *iustum pretium* which fluctuates presents some difficulty with preserving strict equality in exchange. The scholastics might have taken a longer view, arguing that it does not matter if a contracting party recovered more or less in a particular transaction, as long as he normally, or eventually, recovered the just amount.[208]

Writers such as the late scholastic Domingo de Soto also argued that factors such as the risk of destruction or devaluation borne by the contracting parties should be taken into account when determining the *iustum pretium*.[209] Even if this risk did not materialise, a contracting party could gain a little with each transaction to compensate for the times when the risk does materialise and they stand to lose greatly.[210] It is for the same reason that a merchant is allowed to sell his goods for much higher when their value increases due to an external event. While he profits from those times when their value increases, he also carries the risk of their value decreasing.[211]

Lessius argued that discrepancies between the prevailing market price and the *iustum pretium*, which arose due to fluctuations caused by scarcity and demand, had to be tolerated as necessary evils, as these discrepancies were unavoidable in a market economy; in contrast, those discrepancies which arose due to one party taking advantage of another's ignorance, or exploiting necessity or dire circumstances, did not have to be tolerated.[212] Where such discrepancies could not

[206] See Decock *Theologians* 592.
[207] Gordley *Origins* 98.
[208] 98-99.
[209] De Soto *De Iustitia et Iure Libri Decem* 3 5 1 from Gordley *Origins* 100.
[210] Gordley *Origins* 100.
[211] Eligedo (2009) *JBE* 39.
[212] Gordley & von Mehren *Private Law* 463, Gordley *Origins* 99.

be tolerated, i.e. if they were not necessary, the public authority could intervene by imposing a just price.[213]

2 4 3 3 Doubts about the authenticity of the Lex Secunda

As has been noted above,[214] late scholastics such as Arias Piñel were some of the first scholars to realise that the remedy in the *Lex Secunda* was an invention of post-classical Roman law and thus not of classical origin.[215] According to Piñel, the view that the *Lex Secunda* did not form part of classical Roman law, was against the prevailing opinion of all previous writers, and would have shocked the majority of late medieval scholarship.[216] Piñel correctly surmised that the remedy in the *Lex Secunda* was unknown to the classical Roman jurists: the *Corpus* contains no method of assessing what constitutes an unjust price, lesion is not listed as a ground for rescission in D 18 5 (*De rescindenda venditione*), and does not appear as a remedy available to prejudiced parties anywhere else in the imperial constitution, or in other writings from the classical era.[217] Not only did this dispel the doctrine of *dolus re ipsa,*[218] but it also upended the scholarship surrounding the remedy and how it was viewed.[219]

It has been noted above that medieval civilians studied the *Corpus* by analysing the relations between the texts.[220] Once they realised that the *Lex Secunda* is a post-classical invention, this changes how other texts should be interpreted. For example, due to the *Lex Secunda*, medieval scholars interpreted the famous passage in the D 4 4 16 4 to mean that parties were allowed to enter into harsh bargains, *as long as the harm was moderate*. Piñel was the first to realise that there was no such restriction, and that there would accordingly be no difference for the classical Roman jurist between prejudice of more or less than half of the fair price of the good.[221]

[213] Gordley *Origins* 99. See 2 4 3 5 below for a discussion of the *iustum pretium* as the lawfully regulated price.
[214] See 2 4 1 2.
[215] Decock *Theologians* 572.
[216] See Piñel *Commentarri* 2 1 1 3 from Decock *Theologians* 572.
[217] Decock *Theologians* 573.
[218] See above 2 4 1 2.
[219] Decock *Theologians* 574-577.
[220] See the discussion in Gordley *Origins* 68.
[221] Decock *Theologians* 576.

2 4 3 4 Should contracting parties be able to renounce the Lex Secunda?

Piñel and other scholastics such as Luís de Molina, and Antonio Gòmes also introduced some novel arguments with regards to the application of the remedy. They argued for example that the remedy granted by the *Lex Secunda* could not be excluded contractually, since the same weakness which induces a contracting party to conclude a contract at an unjust price would induce them to include a term excluding the remedy.[222] This is especially relevant in the modern contractual context where the remedy would simply be excluded in all standard term contracts.[223] The late scholastics also argued that a party could not renounce the remedy at all if the prejudice were extremely gross (*laesio enormissima*).[224]

2 4 3 5 Just price as the lawfully regulated price

One aspect of the medieval theory regarding the doctrine of *iustum pretium* has been ignored thus far, but should be addressed before continuing. Medieval scholars identified just price as either the current market price, *or as the lawfully regulated price set by the authorities.*[225] From a modern liberal economic perspective this might seem like a paradox; either the just price is a free-floating market price, or it is the centrally regulated price, but it cannot be both. This might not have been a contradiction in medieval economic practices. Gordley argues that in determining the just price the authorities were simply fixing or setting what they believed to be the current market price, taking into account need, scarcity, and the *communis aestimatio* of the buyers and sellers.[226] While plausible, this argument assumes that authorities did not set the lawfully regulated price in order to achieve distributionist goals, which seems more likely than just the maintenance of the just price.[227]

In contrast to price setting by the justly-constituted authorities, the late medieval theologians, civilians, and late scholastics were fiercely opposed to price setting

[222] Decock *Theologians* 590; Gordley *Origins* 102.
[223] See below at 3 4 2.
[224] Gordley *Origins* 102.
[225] See Baldwin (1959) *TAPS NS* 29, 54, 70, 76.
[226] Gordley *Origins* 98; see also Baldwin (1959) *TAPS NS* 29.
[227] See once again the example of the regulation of the price of grain in the Roman republic in n 63.

through monopolistic practices; since this would drive the monopolistic price above the competitive market price.[228]

2 4 3 6 Conclusion

The late scholastic view of the just price was clearly quite nuanced, containing many lessons even for a modern law of contract. Scholastic teaching and doctrine spread throughout Europe during 16th and 17th centuries, and as a consequence is clearly perceivable in the work of the 17th century northern natural law school.[229]

The Roman-Dutch jurist Grotius in turn took over and popularized the teaching and doctrines of the late scholastics,[230] and these doctrines would remain relatively unchanged in the work of his later successors such as Samuel Pufendorf and Robert Pothier.[231] From there these doctrines would make their way into the civilian legal codes and common law case law.[232] The influence of the scholastic writers on Grotius in general is well documented,[233] and this applies specifically to the *iustum pretium* doctrine as well.[234] Indeed all of the most important elements of the scholastic discussion on fairness in exchange seem to be carried forward by him.[235] In this way the work of the late scholastics has particular relevance for South African law of contract.[236]

2 5 Roman-Dutch law

For pragmatic reasons, this section focuses on the doctrine of *laesio enormis* in the law of the Netherlands of the 17th to 18th century, which formed part of the broader supranational "European system of law" termed the *ius commune*.[237] Legal scholars of this era were closely connected, and formed part of a "single and

[228] See Gordley *Origins* 98; Baldwin (1959) *TAPS NS* 29.
[229] Hallebeek *Unjust Enrichment* 87.
[230] Gordley *Origins* 71.
[231] 71.
[232] 4.
[233] See for example Hallebeek *Unjust Enrichment* 87-103; Gordley *Origins* 6.
[234] See for example the Decock *Theologians* 598-600.
[235] 598.
[236] See in this regard T Naudé & G Lubbe "Exemption Clauses – A Rethink Occasioned by Afrox Healthcare BPK v Strydom" (2005) 122 *SALJ* 441 445-450.
[237] See Coing (1986) *CILSA* 483; P Stein "The Ius Commune and its Demise" (2004) 25 *JLH* 161 164.

undifferentiated cultural unit".[238] Due to the near-universal use of Latin in continental European universities, and since courses were all based on the *Corpus Iuris Civilis*, scholars were able to move freely from institutions in one country to those in another.[239]

The views of the Roman-Dutch institutional writers are especially important for this discussion due to the authority which the South African common law attaches to them. This is not to say that the views of other writers of the *ius commune,* such as Pothier or von Savigny are unimportant, as these writers would themselves become influential authorities in South Africa, both through their influence on the *ius commune*, and indirectly through their influence on the English common law.[240]

Our study starts with Hugo de Groot, Latinised as Grotius, one of history's most famous jurists, and arguably the most important of the Roman-Dutch jurists;[241] and spans to Johannes Voet, not the last of the Roman-Dutch jurists, but the last great jurist who played a role in the synthesis of Roman law and the indigenous law of the Netherlands.[242] Writing on *laesio enormis* was however not restricted to these two writers, nor was its application restricted to the province of Holland. In addition to Grotius and Voet, the doctrine is discussed for example, in the work of Schrassert for Gelderland; Groenewegen van der Made, and Van Leeuwen for Holland; Van Wassenaer for Utrecht, and Van der Sande for Friesland.[243]

In time of Grotius, Aristotelean philosophy dominated the European intellectual landscape, both in the Catholic south and in the Protestant north.[244] Loyalty to Aristotelean philosophy is perhaps the aspect of Grotius' writing that marked him as a conservative intellectual, "nearer to being the last of the medieval writers than the first

[238] Zimmermann *Obligations* x; E Fagan "Roman-Dutch law in its South African Historical Context" in *Southern Cross* 33 44.
[239] Zimmermann *Obligations* x; Stein (2004) *JLH* 162; Coing (1986) *CILSA* 488.
[240] See for example LF Van Huyssteen & CJ Maxwell *Contract Law in South Africa* 4 ed (2015) 25 who state that the entire *ius commune* of Western Europe was, and is the common law of South Africa; see also DP Visser "Daedalus in the Supreme Court – The Common Law Today" (1986) 49 *THRHR* 135; R Zimmermann "Roman-Dutch Law in South Africa: Aspects of the Reception Process" (1985) 1 *Lesotho LJ* 97 101-103 for the extent to which the term Roman-Dutch law includes authorities from the broader *ius commune.*
[241] JC de Wet *Die Ou Skrywers in Perspektief* (1988) 128.
[242] 125.
[243] See Hallebeek (2015) *Fundamina* 24 for a general overview of the Roman-Dutch authorities.
[244] Gordley *Origins* 113.

of the moderns."[245] It is ironic that Aristotelean theory was starting to fall out of favour at the same time as the natural lawyers were disseminating the doctrines of the late scholastics.[246] While Grotius hailed Aristotle as "deservedly holding the foremost place among philosophers", contemporary modernisers such as Bacon, Descartes, and later Hobbes, expressly repudiated Aristotle.[247]

Nevertheless, the doctrine of *laesio enormis,* forming part of the positive law, was largely maintained in the civilian legal systems until the late 18th and early 19th century.[248] This was also the case in the Netherlands, where there was a fairly general reception of the doctrine, with a similarly broad application as espoused by the medieval civilians.[249]

2 5 1 Introduction to the views of Grotius and Voet

For natural lawyers such as Grotius, no contrast would have existed between giving effect to the will of the parties, and the regulation of the fairness of the contract.[250] Viewed in terms of the teachings of Aquinas and Aristotle, each contract had its essence defined by the end which it served. In a contract of exchange, such as sale, it was inherent in the contract that equality in the value of what was given and received be maintained.[251] The parties to the contract could only have intended to preserve equality, as would be evidenced by the type of contract which they chose; if they wished to enrich one of the parties they would have made a gift and not an exchange.[252] Grotius makes as much clear when he states in his *De Jure Belli ac Pacis* that the principal act of a contract is that no more be exacted than is just,[253] and that in contracts of exchange this rule should be carefully observed,[254] as it is not the ordinary intention of people to make a donation.[255] This observation of Grotius, that parties to a (non-gratuitous) contract usually intend to make an exchange of

[245] H de Groot & SC Neff *Hugo Grotius On the Law of War and Peace: Student Edition* (2012) xxii, xxiii.
[246] Gordley *Origins* 111.
[247] De Groot & Neff *War and Peace* xxii.
[248] Gordley & von Mehren *Private Law* 464.
[249] Hallebeek (2015) *Fundamina* 23.
[250] Gordley *Origins* 109, Zimmermann *Obligations* 265.
[251] Gordley *Origins* 110.
[252] 110.
[253] *De Jure Belli ac Pacis* 2 12 11 1; All direct citations and translations of this work are taken from H De Groot *De Jure Belli ac Pacis Libri Tres* I & II (1646, transl FW Kelsey, reprint 1995).
[254] 2 12 11 1.
[255] 2 12 11 1.

equal value, forms the basis of many modern arguments in support of a fair price rule.[256]

Grotius explains further that any deviation from the just price is an injustice that should in principle be remedied,[257] even where one of the parties was merely mistaken with regards to the price.[258] However, as the law does not concern itself with trivial matters (*minima*), and in order to avoid a plethora of claims, the law only regulates sufficiently significant deviations or inequalities.[259]

Grotius reached a similar conclusion in his *Inleiding tot de Hollandsche Rechts-geleertheyd*[260] ("*Inleidinge*"). He initially states that any performance which exceeds or falls short of the real value of the thing (*rechte waerde*) is to that extent lacking a reasonable cause.[261] However, he then proceeds to argue that the law nevertheless grants legal force to such contracts due to pragmatic considerations: the precise value of a thing is difficult to ascertain, and endless litigation (that could ensue if all imbalanced contracts could be set aside) should be avoided.[262]

Grotius notes further in *Inleidinge* that the development of a fair price rule was necessary in order to curb the avarice of merchants. Similar to Aquinas, he argues that since the origin of all agreements (*handelinge*) lies in respective abundance and scarcity, reason demands that there should be equality in exchange.[263] Demanding strict equality would however deprive traders from making a profit. Trade functions to the benefit of society as a whole, as without it participants in the market would not be able to procure all manner of things. For their trouble and risk, and due to the constant fluctuation of prices associated with trade, the law allowed contracting parties to transact in whichever manner was most advantageous to them. In due course some contracting parties abused this freedom, acting with self-interest beyond

[256] See most explicitly P Benson "The Unity of Contract Law" in P Benson (ed) *The Theory of Contract Law* (2001) 118 184-195; see also SA Smith "In Defence of Substantive Unfairness" (1996) 112 *LQR* 138.
[257] *De Jure Belli ac Pacis* 2 12 11.
[258] 2 12 12.
[259] 2 12 12.
[260] Citations from *Inleidinge* are taken from H de Groot, SJ Fockema Andreae, & LJ Van Apeldoorn *Inleidinge tot de Hollandsche Rechts-Geleerdheid I & II* 4 ed (1631, reprint 1939); for English translation, reference was made to H de Groot & RW Lee *The Jurisprudence of Holland I* (1926).
[261] *Inleidinge* 3 30 14.
[262] 3 30 14.
[263] 3 52 2.

reason.[264] For this reason the seller prejudiced *ultra dimidium* was afforded relief, first extended to the buyer, and later to other contracts (with the exception of judicial and testamentary sale), and contracts which were part sale and part donation.[265]

The different rationales provided for in *Inleidinge* and *De Jure Belli ac Pacis* might be said to reflect the differing nature of the two books. While *Inleidinge* is usually considered a textbook reflecting the standing law of the Netherlands, *De Jure Belli ac Pacis* by contrast, is often said to reflect the views of Grotius as a natural lawyer.[266]

Voet in turn justifies *laesio enormis* by stating that while parties are usually allowed to get the better of each other, this is not the case where it is clear that there has been great prejudice (*laesio enormis)* to one of the parties, as the matter is then said to involve fraud.[267] Voet conceived of *laesio enormis* as a concretisation of the action arising from fraud.[268] He argues that even in classical Roman law, before the advent of the *Lex Secunda,* unfairness which was plainly clear was remedied by a *bonae fidei* judicial proceeding. In his view, the scope of actions based on good faith was so broad in Roman law that the *Lex Secunda* introduced nothing novel except to provide a yardstick by which unfairness could be measured; where before this discretion had been left to the judge; it now provided relief based on a fixed ratio.[269]

2 5 2 Scope and application of the remedy

2 5 2 1 Who is entitled to the remedy?

As has been noted above, the relief provided under the doctrine of *laesio enormis* had by the time of Grotius and Voet been greatly expanded.[270] According to Grotius, it was on grounds of equity (*billickheid*), that the fair price rule was extended to the buyer who had paid more than twice the value of the goods (as opposed to the seller who has given less than half), and the was later extrapolated to contracts of hire, and

[264] See also Hallebeek (2015) *Fundamina* 23.
[265] 23.
[266] See De Groot & Neff *War and Peace* xix, xxiv.
[267] *Commentarius ad Pandectas* 18 5 3; all translations of *Commentarius ad Pandectas* are taken from the translation and commentary of Gane: J Voet, J van der Linden, & P Gane *The Selective Voet being the Commentary on the Pandects [Paris edition of 1829] and the Supplement to that Work by Johannes van der Linden* (1955).
[268] See the discussion of *dolus ex re ipsa* above at 2 4 1 2.
[269] *Commentarius ad Pandectas* 18 5 4; see also Dias “Laesio Enormis” in *Roman Law of Sale* 47.
[270] See 2 4 2 1 above.

all other similar contracts.[271] Voet argued that this rationale is greater for the remedy to be available to the buyer and not to the seller, as everyone can, and ought to know the value of that which they own, but not necessarily the value of things belonging to others.[272]

2 5 2 2 What types of transactions were covered?

Voet recognised that the remedy applies to all *bonae fidei* judicial transactions, which are bilateral in nature, and even to barter, as it was in his opinion similar to purchase.[273] He noted however, that Roman law did not extend the remedy to loan for use, deposit, or *stricti iuris* contracts,[274] but that custom extended the remedy to all contracts, since the distinction between *stricti iuris* and *bonae fidei* contracts had largely been abolished.[275] Although the *Lex Secunda* had only been applicable to land, *laesio enormis* was also applied to movables in Roman-Dutch law. Voet contended, however, that the remedy should only apply to valuable movables.[276]

2 5 2 3 How was the excess calculated?

Voet differed from Grotius in how *laesio enormis* should be adjudged when it is applied to the buyer. Voet argued that *laesio enormis* was present where a thing worth 100 was bought for more than 150 (instead of 200 as would be advocated by the other writers).[277] Voet argued that buying for more than 150 would lead to a similar prejudice as when a thing was sold for half its worth, i.e. for less than 50 where it was worth 100. In both of these cases the difference between the contract price and the just price exceeds 50. Though Voet is supported in his opinion by Damhouder,[278] the more conventional view as espoused by Grotius is probably correct.[279] Like the seller who receives less than half of the value of the *merx* in the

[271] *Inleidinge* 3 52 2; see also S van Leeuwen *Het Rooms-Hollands-Regt* 4 20 5; S van Groenewegen van der Made *Tractatus De Legibus Abrogatis* ad 4 44 2.
[272] *Commentarius ad Pandectas* 18 5 5.
[273] 18 5 13.
[274] 18 5 14.
[275] 18 5 14.
[276] 18 5 12.
[277] 18 5 5.
[278] Damhouder *Praxis Rerum Civilum* 48 8.
[279] *Inleidinge* 3 52 2; this view is also supported by J van der Linden *Koopmans Handboek* (1806, reprint 1930) 160 (3 15 10 3).
[279] JW Wessels & AA Roberts *The Law of Contract in South Africa II* 2 ed (1951) 1216-1217.

purchase price, the buyer here receives less than half the value of his money in the *merx*.

Voet states that since the question whether there was *laesio* enormis is a question of fact, the burden of proof lies on the party seeking relief.[280] Voet denies the remedy to those who knew the true value of the good, and nevertheless sold it, or bought it, consciously incurring *laesio enormis*.[281] A person who is knowingly wronged is deceiving himself and therefore can complain of no wrong.[282] This is linked to Voet's conception of *laesio enormis* as a type of fraud.[283] One cannot be aware that fraud is occurring in a sale, and then later raise it as an exception.[284] There might however be cases, where even though the seller knows the true value of a thing, he sells it because of dire necessity. Voet would deny the seller the remedy in this case, which has led to his view being criticised.[285]

2 5 3 How is a just price to be determined?

In discussing how the just price of a thing is to be determined, Grotius states that the most natural measure is *indigentia,* or the need for it.[286] However, he cites the great value attached to pearls as an example that *indigentia* cannot be the sole measure of the value of a thing. Grotius favoured valuing things by the price which was usually offered or given for it. He also states however that account has to be taken of the labour and expenses involved in the production of a thing, and that the current price is not so fixed so as to now allow for some variance or discrepancy in the price.[287]

Voet in turn states that the value of a thing should be determined not with reference to the private affection or subjective value, which one person attaches to it, but rather with reference to the quality, and the amount of earnings received from it.[288] The value of the thing must be judged as it was at the time and place where the

[280] *Commentarius ad Pandectas* 18 5 7.
[281] 18 5 17.
[282] 18 5 17; see also the similarity of this view to that of the glossators above at 2 4 1 2.
[283] See Hallebeek "De Iustum Pretium leer" in *Historische Wortels* 6.
[284] *Commentarius ad Pandectas* 18 5 17.
[285] Wessels & Roberts *The Law of Contract II* 1218 (paras 5100-5012).
[286] *De Jure Belli ac Pacis* 2 12 14 1.
[287] 2 12 14 2.
[288] *Commentarius ad Pandectas* 18 5 7.

contract was concluded, and not at the time that the action is brought.[289] Voet wisely acknowledges that the price of a thing differs between different places and different times as the demand and supply of a certain thing changes.[290] Both of these writers seem therefore to favour an understanding of just price that aligns with market price.

2 5 4 The nature of the remedy

As with the *Lex Secunda*, the advantaged party could avoid rescission of the contract if they were prepared to increase the selling price in the case of a prejudiced seller, or decrease the selling price in the case of a prejudiced buyer, to the just price.[291] The effect of the remedy was to place the respective parties in the position they were in had no sale taken place, meaning that mutual duties of restoration arose regarding the delivered performances.[292]

2 5 5 Just price and Calvinist commercial ethics

There has in recent times been some dispute as to whether the position set out above was indeed the position in everyday Dutch trade practice and moral concerns, or whether this was only the "sophisticated law of learned Dutch scholars".[293] Hallebeek has tried to show, however, that while the legal handbooks discussed above, and the more vernacular ethics handbooks written for merchants seem to contradict each other at first glance in relation to rules on fair price, this can be explained by the fact that these books tend to emphasise different aspects of the just price doctrine due to their differing purpose and standards.[294] While the legal textbooks studied above followed the approach of the civilian doctrine of *laesio enormis*, Calvinist ethics textbooks advocated for the stricter standard of the forum of the conscience in accordance with the doctrine of restitution as espoused by medieval theologians.[295] Both the legal and ethics handbooks seem therefore to advocate for a just price doctrine.

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[289] 18 5 7.
[290] 18 5 7.
[291] Van der Linden *Koopmans Handboek* 160 (3 15 10 3); Van Leeuwen *Het Rooms-Hollands-Regt* 4 20 5
[292] Wessels & Roberts *The Law of Contract II* 1220.
[293] See Whitman (1996) *Yale LJ* 1841-1889, see especially 1853-1854; Hallebeek (2015) *Fundamina* 24.
[294] Hallebeek (2015) *Fundamina* 31.
[295] 31; see also 2 4 2 2 above.

2 5 6 Conclusion

Very few of the arguments and theories in support of a fair price rule mentioned by Grotius, Voet, or the writers of the broader *ius commune* are particularly novel. The three determinants of just price mentioned by Grotius had all been mentioned in medieval commentaries to Aristotle's ethics, and in some form or another by Aquinas and his contemporaries.[296] The theories of just price developed by the Roman-Dutch writers therefore seem to mainly be a continuation of earlier scholastic theories of just price.

A second interesting point is that a general theory or justification for fair price rules seems to be lacking in the writing of the Dutch (and indeed French, and German) jurists of the 17th and 18th centuries. As is evident in the views of Grotius and Voet above, these writers usually did not go much further than stating in some form or another, that exchange requires equality.[297] Pothier for example, while defending *laesio enormis,* wrote simply that "equity, in acts of commerce, consists in equality". He nevertheless found it necessary to justify the remedy further by arguing that the gross disproportion was evidence of imperfection in the consent of the prejudiced party.[298] This points to a change in the understanding of equality in exchange. As the Aristotelean ideas of commutative justice were disappearing from the reasoning of these writers,[299] gross disproportion seems to change from being a reason in itself to set aside a contract, to merely being evidence of a procedural defect in the conclusion of a contract. This important line of thought will be pursued further in the next chapter.

2 6 Conclusion: Towards the modern law of contract

The *iustum pretium* rule underwent significant change in the Middle Ages, from a remedy meant to apply to a specific legal question, to a general rule or principle requiring equality in exchange.[300] While this is in part due to the fondness which

[296] Gordley & von Mehren *Private Law* 463.
[297] 463.
[298] Gordley *Origins* 101.
[299] 101.
[300] Hallebeek (2015) *Fundamina* 21.

canon law enjoyed for the doctrine,[301] this development started well before canon law, and was continued afterwards in the civilian tradition.[302]

This metamorphosis related to the form as well as the substance of the remedy. The same rules cannot necessarily apply to an exceptional remedy for the sale of land at undervalue, and to a general principle of equality in exchange.

The glossators, ignorant of the exceptional nature of the *Lex Secunda*, and reading the *Corpus Iuris Civilis* as a unitary whole, interpreted the *iustum pretium* as the current market price in free competition. Not only was such an interpretation suggested by other Roman texts, but it was also the only possible way for them to interpret the remedy without invalidating thousands of transactions happening every day.[303] While the original purpose of the remedy is unfortunately unclear, from the rebirth of Roman law throughout the Middle Ages and into the early modern age it was viewed as a remedy enforcing a market-oriented just price. This remedy was aimed at avoiding exploitation, weakness, price discrimination, fraud, and exceptionally harsh bargains,[304] rather than at ensuring that things are sold for their inherent or objective worth. Even Aquinas, the disciple of Aristotle, whose theory of essences seemed to hint at an intrinsic worth in all things, viewed the *iustum pretium* as a market-oriented price.[305]

Though the Romans left us with few clues as to the justification and application of the *Lex Secunda*, the fair price doctrine was meticulously discussed and expounded through the Middle Ages. Hardly a question could be conceived that was not discussed by the glossators, theologians, late scholastics, or writers of the *ius commune*. This does not mean there were definitive "right" answers to all of these questions. It was pointed out, for example that Voet and Grotius differ with regards to certain facets of the application of the remedy; such as what the nature of the relief is, or under what circumstances the remedy is available to the buyer. These questions are, however, not unanswerable. As becomes apparent in the next chapter

[301] See 2 4 2 1.
[302] See 2 4 1 1; see also 2 4 3 6.
[303] Gordley *Origins* 65.
[304] See for example Decock *Theologians* 602; F Monsalve "Economics and Ethics: Juan de Lugo's Theory of the Just Price, or the Responsibility of Living in Society" (2010) 42 *History of Political Economy* 495 496, 515-516.
[305] See Aquinas *Summa Theologica* 2 2 77 1; Baldwin (1959) *TAPS NS* 74.

on the fate of *laesio enormis* in modern systems, there are many potentially meritorious approaches to enforcing a fair price rule.

CHAPTER THREE: A COMPARATIVE OVERVIEW OF THE CONCEPT OF A FAIR PRICE OR *IUSTUM PRETIUM*

3 1 Introduction

The previous chapter gave an historical account of the origin and development of the fair price rule from its inception in Roman law, through the Middle Ages to early modern Roman-Dutch law. This chapter provides a comparative overview and analysis of how several modern legal systems approach equality in exchange, and more specifically substantive fairness in price. The aim of this comparative analysis is to provide a backdrop for the evaluation and critical analysis of the fair price rule in the subsequent chapters. Before moving on to the modern law of contract, it is necessary first to provide a brief overview of the falling out of favour which the fair price rule experienced during the 18th and 19th centuries.

3 2 The decline and fall of the doctrine of *laesio enormis*

Due to new philosophical schools that were emerging in the 17th and 18th century, philosophers and the educated elite increasingly rejected Aristotelean ideas such as the metaphysics of essences, and Aristotelean conceptions of the virtues of promise keeping, which underlay much of the contract law theory of the late scholastics.[1]

According to the scholastics, parties entered into a certain contract through an exercise of their will, but the obligations of the contract were determined by the type to which it belonged.[2] Natural lawyers, by contrast, argued that parties should be free to determine the content and obligations of the contract, in line with the concept of freedom of contract.[3] Equality of exchange would accordingly no longer be viewed as one of the basic principles of contracts of exchange.[4]

The concept of the will of the contracting parties featured so strongly in the writing of the European jurists of the 18th and 19th century that they were viewed as having developed a "will theory" of contract.[5] The will of the parties was not a novel

[1] See J Gordley *The Philosophical Origins of Modern Contract Doctrine* (1991) 111-114.
[2] 201.
[3] J Hallebeek "Some Remarks on *Laesio Enormis* and Proportionality in Roman-Dutch Law and Calvinistic Commercial Ethics" (2015) 21 *Fundamina* 14 32.
[4] R Zimmermann *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1990) 265.
[5] Gordley *Origins* 161.

consideration in contract law theory; it had been used by the scholastics in conjunction with other considerations such as the virtues of promise keeping, equality in exchange, and the essence of a contract. What was novel was that the will theorists almost exclusively spoke of the will of the parties as the basis for a contract.[6]

The German jurist Christian Thomasius (1655-1728), a member of the natural law school, was at the forefront of the attack on *laesio enormis*.[7] Thomasius published a dissertation in 1706 titled *De Aequitate Cerebrina Legis Secundae de Rescindenda Venditione* which was strongly critical of this doctrine on the basis that it violates the individualistic notion of freedom of contract.[8] Thomasius argued that the contents of a contract depends only on the free will of the parties,[9] and accordingly that no just price can exist outside of that agreed upon by the parties.[10] He argued that for a just price to be possible, value would have to reside in the inherent qualities of a thing.[11]

It is contentious how much of the scholastic doctrine of just price Thomasius understood. Gordley argues that Thomasius misunderstood the scholastic conception of equality in exchange, as the scholastics never argued for the just price to be based on some intrinsic or objective worth of a thing, but rather on the market price.[12] Thomasius' invective against the doctrine of laesio *enormis* should also be viewed as part of the struggle against the authority of Roman law;[13] an issue which cannot be discussed at length here, but which has received significant attention elsewhere.[14]

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[6] 161.
[7] J Gordley & AT von Mehren *An Introduction to the Comparative Study of Private Law – Readings, Cases, Materials* (2006) 464.
[8] See T Anhert "Roman Law in the Early Enlightenment Germany: The Case of Christian Thomasius' *De Aequitate Cerebrina Legis Secundae Codicis de Rescindenda Venditione* (1706)" (1997) 24 *Ius Commune Zeitschrift für Europäische Rechtsgeschichte* 153 156-157.
[9] *De Aequitate Cerebrina* 2 15 from Anhert (1997) *Ius Commune Zeitschrift für Europäische Rechtsgeschichte* 157-158.
[10] *De Aequitate Cerebrina* 2 16 from Anhert (1997) *Ius Commune Zeitschrift für Europäische Rechtsgeschichte* 158.
[11] *De Aequitate Cerebrina* 2 14 from Gordley & von Mehren *Private law* 464; Anhert (1997) *Ius Commune Zeitschrift für Europäische Rechtsgeschichte* 158.
[12] Gordley *Origins* 94-95; Anhert (1997) *Ius Commune Zeitschrift für Europäische Rechtsgeschichte* 158 n 20 disputes this claim, but does not provide much evidence either way.
[13] Anhert (1997) *Ius Commune Zeitschrift für Europäische Rechtsgeschichte* 162.
[14] See Anhert (1997) *Ius Commune Zeitschrift für Europäische Rechtsgeschichte* 164; N Jansen "Verwicklungen und Entflechtungen: Zur Verbindung und Differenzierung von Recht und Religion, Gesetz und Rechtlicher Vernunft im Frühneuzeitlichen Naturrechtsdiskurs*"* (2015) 32 *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte (Germanische Abteilung)* 29 74.

Nevertheless the arguments of Thomasius greatly impressed other natural lawyers of his era, such as the Prussian jurist Carl Gottlieb Suarez, who did not include *laesio enormis* when drafting the *Allgemeines Landrecht für die Preußischen Staaten* of 1794 ("Prussian Civil Code"),[15] as well as the French jurist Théophile Berlier, who argued for its abolition in the French *Code Civil*.[16] This position was followed by 19th century French and Belgian jurists such as Charles Demolombe and François Laurent,[17] and Germans such as Wilhelm Endemann, leading to the abolition of the remedy in much of Germany.[18] The doctrine forms part of the French *Code Civil*[19] but, like the *Lex Secunda,* is restricted to the seller of land.[20] The doctrine never formed part of the English common law, where traditionally an agreement was enforceable whether or not adequate consideration was given.[21]

The focus thus now shifts from the age of the *ius commune*, to the age of codification. Pioneering civil codes were adopted in France, Prussia, and Austria in the late 18th to early 19th century,[22] and these were followed by the highly influential German Civil Code ("BGB") that entered into force at the beginning of the 20th century.

Discussing the treatment of equality of exchange in modern codified systems, as well as, by way of contrast, in the uncodified common law, would in turn hopefully contribute to evaluating and formulating proposals for the reform of the modern South African law of contract, which has retained uncodified civil law, and also has been influenced by English law. In this regard it may be especially significant to understand how some systems treat the relationship between the substantive unfairness associated with an excessive price, and problems with the formation of the contract, such as exploiting weakness or abuse of circumstances; as indicated, these have been familiar challenges in the civilian tradition.

[15] Gordley & von Mehren *Private Law* 464; see 2 6 2 below.
[16] 464, see 3 5 3 below.
[17] 465.
[18] 464; see 2 6 2 1 below.
[19] Art 1674 of the *Code Civil*.
[20] Gordley & von Mehren *Private Law* 463.
[21] 466.
[22] 466.

3 3 German Law

3 3 1 Introduction

While it was never the intention of the drafters of the BGB, there is ample evidence to suggest that contracts in German law can today be voided almost exclusively on the basis that a gross disproportion exists between the values of the respective performances. To understand how and why this development occurred, one has to follow the developments in case law dealing with gross disproportion under § 138 (1) and (2) BGB.

3 3 2 Historical Development

As mentioned above,[23] the ideas of Thomasius had a direct influence on the development of early modern German law. During the drafting of the Prussian Code, Suarez argued that the whole theory underlying *laesio enormis* had been cast in doubt by Thomasius and other legal scholars.[24] The Prussian Code provided therefore that the objection that the price of a thing does not bear a relation to its true value is not in itself cause to invalidate a contract.[25] However, in the adjoining provision, it was determined that if the disproportion was so great that the purchase price exceeded twice the value of the thing, mistake invalidating the contract could be presumed.[26] *Laesio enormis* was also abolished in the German state of Bavaria in 1861, and in Saxony in 1863, and as well as in general German commercial law by the *Allgemeines Deutsches Handelsgesetzbuch* of 1861.[27]

Due to the same liberal approach adopted by German jurists in the abolition of *laesio enormis*, the control of interest rates similarly fell out of favour in Germany during the latter half of the 19th century. By 1867, usury laws were abolished in the whole of Northern Germany.[28] The idea was seemingly (and naively) to create a

[23] See 3 2 above.
[24] See J Gordley "Equality in Exchange" (1981) 69 *CLR* 1587 1592; H Kalb *Laesio Enormis in Gelehrten Recht* (1992) 215.
[25] I 11 § 58 *PrALR*: *Der Einwand, daß der Kaufpreis mit dem Werthe der Sache in keinem Verhältnisse stehe, ist für sich allein den Vertrag zu entkräften nicht hinreichend.*
[26] I 11 § 59 *PrALR*: *Ist jedoch dieses Mißverhältniß so groß, daß der Kaufpreis den doppelten Betrag des Werths der Sache übersteigt, so begründet dieses Mißverhältniß, zum Besten des Käufers, die rechtliche Vermuthung eines den Vertrag entkräftenden Irrthums. (Tit. IV. §. 75. sqq.).*
[27] Gordley (1981) *CLR* 1593.
[28] Zimmermann *Obligations* 175; JP Dawson "Economic Duress and the Fair Exchange in French and German Law" (1937) 12 *Tulane LR* 42 48.

regime of free competition, but this was not to be. Complaints about usurious practices increased during this period and it became clear that some form of control had to be reintroduced.[29] By 1880 imperial legislation had made it a criminal offence to lend money at a rate which exceeded the customary rate of interest, where that rate was achieved through the exploitation of certain types of weakness in the other party.[30] The scope of the legislation was extended to other bilateral contracts with a similar purpose in 1892, and then incorporated into the new BGB.[31]

The drafting commission of the BGB had intended to abolish all forms of relief relating to excessive prejudice, in favour of adopting legislation in relation only to usurious interest rates.[32] The second paragraph of § 138 BGB was however inserted by a committee of the Reichstag (after it had been rejected by the first and second drafting commission).[33] The provision currently reads as follows:

> "§ 138 Sittenwidriges Rechtsgeschäft; Wucher
> (1) Ein Rechtsgeschäft, das gegen die guten Sitten verstößt, ist nichtig.
> (2) Nichtig ist insbesondere ein Rechtsgeschäft, durch das jemand unter Ausbeutung der Zwangslage, der Unerfahrenheit, des Mangels an Urteilsvermögen oder der erheblichen Willensschwäche eines anderen sich oder einem Dritten für eine Leistung Vermögensvorteile versprechen oder gewähren lässt, die in einem auffälligen Missverhältnis zu der Leistung stehen."

> "§ 138 Transaction contrary to good morals; usury
> (1) A legal transaction which violates good morals is void.
> (2) A legal transaction is also void when a person takes advantage of the distressed situation, inexperience, lack of judgement ability, or grave weakness of will of another to obtain the grant or promise of financial advantages for himself or a third party that are obviously disproportionate to the performance given in return."[34]

3 3 3 Functioning of § 138 BGB

§ 138 (1) BGB declares void contracts that are judged to be illegitimate on the basis of being *contra bonos mores*, which can be translated as contrary to good

[29] Zimmermann *Obligations* 175; A similar experiment occurred in the 19th century in England and the United states with the repeal of usury law, which lead to a similar result – a proliferation of loansharking practices, and an increase in poverty; see EA Posner "Contract Law in the Welfare State: A Defense of the Unconscionability Doctrine, Usury Laws, and Related Limitations on the Freedom to Contract" (1995) 24 *JLS* 283, 313.
[30] Zimmermann *Obligations* 176. Dawson (1937) *Tulane LR* 48.
[31] Zimmermann *Obligations* 176*;* Dawson (1937) *Tulane LR* 48.
[32] Dawson (1937) *Tulane LR* 49.
[33] See Dawson (1937) *Tulane LR* 49 as well as Gordley (1981) *CLR* 1626; A minor amendment of the provision occurred in 1976 in order to harmonise the terminology with that of the Criminal Code (*Strafgesetzbuch*).
[34] Translation from Gordley & von Mehren *Private Law* 474.

morals, or more loosely as contracts that are illegal because they are against public policy.[35] Despite the drafters of the BGB being aware of the dangers posed by wide discretion granted to judiciary by the provision, the provision was nevertheless included with the aim that the courts would further develop and concretise it.[36] As will be outlined below, courts have indeed played a significant role in the development of the provision, but not always in the manner which the drafters might have anticipated.

In contrast to the general prohibition of illegal contracts under § 138 (1) BGB, § 138 (2) BGB is aimed at combatting a specific instance of a *contra bonos mores* contract, namely *Wucher.*[37] While *Wucher* is usually translated as usury, the meaning of the term in Germany is broader than just taking excessive interest, but rather refers to the taking of excessive advantage.[38] § 138 (2) BGB is usually said to contain an objective and subjective requirement in order for a contract to be set aside. There must be a striking objective disproportion in the respective performances of the contracting parties, and this disproportion has to be brought about by the exploitation of one of the listed deficiencies, namely a distressed situation, inexperience, lack of judgement, or grave weakness. The first requirement is said to look at objective disparity while the second requirement can be said to refer to procedural defects in the bargaining process.[39]

In line with the general rule in German law, the party alleging illegality under § 138 BGB bears the burden of proof in the dispute, both with regards to the objective and subjective requirements, although they might be assisted by special presumptions in the latter.[40]

3 3 3 1 The procedural or subjective requirement of § 138 (2) BGB

The subjective or procedural element of § 138 (2) BGB has posed quite a challenge due to the fact that these subjective elements of weakness are usually

[35] See BS Markesinis, H Unberath, & A Johnston *The German Law of Contract: A Comparative Treatise* 2 ed (2006) 24. It should be noted that this provision fulfils a different function to § 134 BGB, which declares contracts that violate a statutory provision illegal.
[36] 24, 248.
[37] Zimmermann *Obligations* 176.
[38] Gordley & von Mehren *Private Law* 474.
[39] Markesinis et al *Law of Contract* 250.
[40] C Armbrüster in FJ Säcker, R Rixecker, H Oetker, & B Limperg (eds) *Münchener Kommentar zum Bürgerlichen Gesetzbuch* 7 ed (2015) ("*MüKo*") § 138 [168]; JE du Plessis "Illegal Contracts and the Burden of Proof" (2015) 132 *SALJ* 664 669.

interpreted by the courts in a very narrow fashion.[41] The terms "grave weakness of will" and "lack of judgement" have for example been taken to refer to quite serious defects, which, while not necessarily amounting to pathological conditions, should border on a lack of capacity.[42] Courts have also ruled, for example, that the inexperience of the disadvantaged party must relate to commercial practice in general, and not specifically to the transaction in question.[43]

In adjudicating whether a person was in a distressed situation (*Zwangslage*) German courts historically applied a similarly strict test.[44] So for example, a disadvantaged contracting party who entered into a prejudicial agreement in order to secure a loan, was deemed by the court to not be in a distressed situation since he otherwise owned assets which he chose not to sell.[45] The courts have similarly refused the remedy where contracting parties needed money, but could otherwise have secured a loan.[46] While German courts today do not require that the *Zwangslage* should threaten the economic existence of the disadvantaged contracting party, they do require that disadvantaged parties should find themselves in a situation of serious distress.[47]

Some courts have also required that the advantaged party must have knowingly abused the enumerated weakness of the disadvantaged party,[48] or that he must have obtained his benefit in a manner which is reproachable.[49]

Courts therefore became quite dissatisfied with the procedural requirement of § 138 (2) BGB as it was viewed as being too confining, leading to the courts sometimes attempting to circumvent the requirement.[50] The simplest way in which courts have done this, was to infer from the objective disproportion in the value of the

[41] Markesinis et al *Law of Contract* 251.
[42] See Markesinis et al *Law of Contract* 251; BGH NJW-RR 1988, 763, 764.
[43] Markesinis et al *Law of Contract* 251; see OLG Hamm NJW-RR, 1993, 628, 629.
[44] See the cases of the *Reichsgericht* at the turn of the 20th century discussed in JP Dawson "Unconscionable Coercion: The German Version" (1976) 89 *HLR* 1041 1056-1058.
[45] RG, 20.05.1916 reported in *Warneyers Jahrbuch der Entscheidungen Ergänzungsband* (1916) case no 195, p 311; see Dawson (1976) *HLR* 1058.
[46] RG, 30.04.1914 reported in *Seufferts Archiv* 69 (1914) no 232, p 436; see Dawson (1976) *HLR* 1057.
[47] Armbrüster in *MüKo* § 138 [149].
[48] See BGH NJW 1994, 1275-1276.
[49] IH van Loo *Vernietiging van Overeenkomsten op Grond van Laesio Enormis, Dwaling, of Misbruik van Omstandigheden* LLD Thesis, Open Universiteit (2013) 274.
[50] Gordley (1981) *CLR* 1630.

respective performances that the disadvantaged party did in fact suffer from one of the weaknesses at the time of the conclusion of the contract.[51]

3 3 3 2 The development of § 138 (1) BGB to combat inequality in exchange

Much more significantly, however, where an absence of clear proof of one of the enumerated weaknesses was present, courts preferred to side-step § 138 (2) BGB altogether, by finding the contract itself to be contrary to good morals (*gute Sitten*) under the much more open § 138 (1) BGB.[52]

This occurred first in 1921 in a case before the *Reichsgericht,*[53] where the court determined that despite there being no evidence of the lessee being in special difficulty when the contract was concluded, the fact that he entered so easily into an unusually onerous contract indicates indiscretion, the inability to appreciate the consequences of the contract, and a lack of reflection.[54] The court concluded that even though a contract cannot be avoided solely due to objective disproportion under § 138 (2) BGB, other circumstances alone, or in combination with such a disproportion, may indicate that a transaction is immoral and therefore void under § 138 (1) BGB.[55] This judgment opened the door for courts to circumvent the subjective requirement of § 138 (2) BGB by avoiding the contract under § 138 (1) BGB.

The question then became what exactly is needed, in addition to a striking disproportion, to invalidate a contract in terms of this provision.[56] This was answered in another case before the *Reichsgericht* in 1936,[57] where the court found that the advantaged party needed to display such a reprehensible character that the juristic act as a whole, when considering its content, motive, and purpose, offends against good morals.[58] The advantaged party can display such a reprehensible character or attitude either through deliberate exploitation of the weaker economic position of the other party, or through gross negligence, by not realising that the disadvantaged

[51] Gordley (1981) *CLR* 1647; Zimmermann *Obligations* 268.
[52] See Gordley & von Mehren *Private Law* 475.
[53] RGZ 103, 35, 37.
[54] See Gordley & von Mehren *Private Law* 475.
[55] See 476.
[56] § 138 (2) BGB would be superfluous, if nothing else were required; see Gordley (1981) *CLR* 1630.
[57] RGZ 150, 1, 2.
[58] See Gordley & von Mehren *Private Law* 477.

party entered into the contract due to his dire circumstances.[59] The advantaged party therefore acts in a negligent fashion by not taking into account the interests of the other party, and by not preventing the gross disparity from arising.[60]

This position is so dominant today that in cases where lower courts have applied the more stringent criteria of § 138 (2) BGB, the BGH have overturned their judgments on the basis that where it is possible, the lighter requirements of § 138 (1) BGB should be applied.[61] These decisions have therefore blurred the line considerably between § 138 (1) and (2) BGB.

3 3 3 3 Displaying a "reprehensible character"

This additional requirement under § 138 (1) BGB, of displaying a reprehensible character has also been watered down considerably. Courts have often been prepared to infer some circumstance indicating weakness, or exploitation thereof, from the objective disparity in the value of the respective performances, to the extent that the requirement of showing a reprehensible character has been called a fiction,[62] and without any practical significance.[63] Courts will often assume intent or negligence on the part of the advantaged party, who very rarely succeeds in showing that he was not negligent.[64]

Some courts have gone as far as to argue that if an especially gross disproportion exists (*besonders grobes Missverhältnis)*, as opposed to just a strikingly gross disproportion (*auffälliges Missverhältnis)*, the disparity would be enough *per se* to void the contract.[65] However, the more general position seems to be that once an especially gross disproportion has been proved, a rebuttable presumption (*Vermutung*) arises that the advantaged party has displayed a reprehensible character,[66] which, as noted above, is difficult to rebut.[67] Like any presumption, it

[59] Zimmermann *Obligations* 269.
[60] Van Loo *Vernietiging* 273.
[61] Van Loo *Vernietiging* 274-275; see BGH, NJW 1985, 3006, 3007, especially para 4.
[62] Markesinis et al *Law of Contract* 254; Zimmermann *Obligations* 269.
[63] Gordley (1981) *CLR* 1631, 1649; Van Loo *Vernietiging* 273.
[64] Gordley (1981) *CLR* 1631; Van Loo *Vernietiging* 275.
[65] Zimmermann *Obligations* 269; Van Loo *Vernietiging* 275; see OLG Stuttgart, NJW 1979, 2409.
[66] See Armbrüster in *MüKo* § 138 [116].
[67] Van Loo *Vernietiging* 275.

assists the prejudiced party in proving the reprehensible character, but does not prove it by itself.[68]

Courts have even granted relief in cases where the only signs of weakness were, respectively; that the print was small, that the language was unclear, that the monthly and not the yearly interest rate was provided, or that the disadvantaged party needed money urgently.[69]

3 3 3 4 The role of the presumption of a reprehensible character

This presumption that the advantaged party has displayed a reprehensible character will arise customarily in certain types of contracts, especially those between professionals and consumers, where the courts assume that the consumer is in a structurally weaker position.[70] Examples include consumer credit contracts,[71] or contracts for the purchase of immovable property, or financial lease agreements.[72] This differs for example from business-to-business contracts, such as commercial lease or rental agreements. In these cases the presumption will typically not arise, in part due to the difficulty involved in proving that it was possible for the advantaged party to know of the existence of the gross disproportion,[73] and in part due to the fact that the prejudiced party is a commercial party and therefore presumably in less need of protection.[74]

There are some indications that this presumption does not function as strongly as it used to, and there are many examples in practice of how this presumption can be rebutted.[75] One of these is to show that despite the disproportion the disadvantaged party accepted the contract due to a special affection for the *merx* (*besonderes Affektionsinteresse*).[76] The presumption can also be rebutted by showing that the disadvantaged party was entirely indifferent towards the contract price.[77] This is typical in situations where a contracting party is so wealthy that he displays a

[68] Armbrüster in *MüKo* § 138 [116].
[69] See Gordley (1981) *CLR* 1648.
[70] Markesinis et al *Law of Contract* 254.
[71] Markesinis et al *Law of Contract* 255; see BGH, BGHZ 128, 255, 257.
[72] Armbrüster in *MüKo* § 138 [116].
[73] [116].
[74] [116].
[75] Armbrüster in *MüKo* § 138 [116]; see BGH, NJW 2001, 1127, 1129.
[76] Van Loo *Vernietiging* 276.
[77] BGH, NJW 2001, 1127, 1129; Van Loo *Vernietiging* 276-277.

complete disinterest towards the contract price because money is no object. A further ground for rebuttal of the presumption exists where there has been a mutual mistake with regard to the value of the *merx*.[78]

It is not required under § 138 (1) BGB that the advantaged party should have been aware of the disproportion,[79] and conversely it is not enough for the advantaged party to allege that he was unaware of the disproportion in order for the presumption to be rebutted.[80] It is required however that the advantaged party should have been able to find out about the disproportion.[81] Accordingly, the application of § 138 (1) BGB can be negated by proving that there was no way for the advantaged party to discover the disproportion in the value of the performances.

The presumption will not be rebutted, however, merely by proving that the disadvantaged party was aware of the disproportion, and it cannot be inferred from this alone that the disadvantaged party acted freely in concluding the contract.[82] An example of such a situation might be a contract concluded while the disadvantaged party was in a distressed situation. The fact that they knowingly assent to an exploitative price cannot be used to prove that they freely assented to the contract.

3 3 4 Calculating the disproportion: A flexible approach

What is considered to be a striking or manifest disproportion (*auffälliges Missverhältnis*) and in relation to what is it calculated? The general rule is that the market price is used as a measure for what is appropriate.[83] The disproportion is measured in relation to objective market value, and not the subjective value attached to it by one of the parties.[84] The value of performances is always measured at the date of the conclusion of the contract.[85] There is no fixed ratio according to which this

[78] Van Loo *Vernietiging* 276-277; see BGH, NJW 2001, 1127, 1129.
[79] Armbrüster in *MüKo* § 138 [116]; see BGH, BGHZ 146, 298, 303.
[80] Armbrüster in *MüKo* § 138 [116].
[81] [116]
[82] Armbrüster in *MüKo* § 138 [116]; BGH, NJW 2010, 363, 364 para f; this is an important difference between the approach followed in Germany, and that followed in Austria and Louisiana.
[83] Armbrüster in *MüKo* § 138 [113]; Markesinis et al *Law of Contract* 248; Dawson (1976) *HLR* 1063; Van Loo *Vernietiging* 265.
[84] Armbrüster in *MüKo* § 138 [114].
[85] Armbrüster in *MüKo* § 138 [114]; Van Loo *Vernietiging* 266.

disproportion is measured; what is appropriate should be decided on a case by case basis before the courts.[86]

Nevertheless the courts being influenced quite strongly by the doctrine of *laesio enormis* often make use of the classical (2:1) ratio as a guideline.[87] A price that is more than double, or less than half, of the market price is usually considered an especially gross disproportion (*besonders grobes Missverhältnis*).[88] The BGH has in the past been criticised for blurring the distinction between a gross disproportion, and an especially gross disproportion by using the terms in conjunction, or interchangeably.[89] It has recently clarified however that an *auffälliges Missverhältnis* exists where the difference between performance and counter-performance is significant, but still falls short of a *besonders grobes Missverhältnis*.[90] In the case in point the court accepted that a disproportion of between 57.59% and 62.36% (depending on how it was calculated) fell short of a *besonders grobes Missverhältnis,* but still constituted an *auffälliges Missverhältnis*.[91] Where necessary the value of the disproportion is determined with the aid of an expert.[92] In summation, a price that is more than double, or less than half the market price is usually considered a *besonders grobes Missverhältnis*, anything short of that but still striking is considered an *auffälliges Missverhältnis*. This leaves us with little indication of the minimum disproportion that must exist, however, in order for the objective requirement to be satisfied.

Because § 138 BGB, in contrast to the classical doctrine of *laesio enormis*, does not make use of a fixed threshold beyond which the disparity in the value of performances is considered striking or manifest, the application of the guidelines discussed above usually varies according to the surrounding circumstances, the type of contract, and the nature of the parties. So for example in contracts for the lease of residential housing, a rental price that exceeds the market price by more than 50% has been declared illegal, while for commercial lease contracts the benchmark is

[86] Zimmermann *Obligations* 176.
[87] Van Loo *Vernietiging* 269.
[88] Armbrüster in *MüKo* § 138 [114]; Zimmermann *Obligations* 268; BGH, NJW 1992, 899, 900; BGH, NJW 2000, 1487, 1488.
[89] Armbrüster in *MüKo* § 138 [114] n 661.
[90] Armbrüster in *MüKo* § 138 [114]; BGH, BGHZ 160, 8, 16.
[91] BGH, BGHZ 160, 8, 16 para f.
[92] Van Loo *Vernietiging* 268.

exceeding the market price by 100%.[93] For real-estate transactions the BGH assumes that an especially gross disproportion exists when the contract price exceeds the value of the *merx* by 90%.[94]

The flexible nature of this approach allows the BGH to apply the remedy in cases where it is difficult to determine the exact value of performance; most prominently cases involving an element of chance.[95]

The BGH has also in the past looked not only at the prejudice suffered by the disadvantaged party in terms of the contract price versus the market price, but also in absolute terms, so as to be able to compare the prejudice to other measures, such as for example, the average German monthly income.[96]

3 3 5 Effect of § 138 BGB

A contract found to be usurious is void (*nichtig*).[97] Obligations assumed thereunder are unenforceable,[98] and performances already performed are to be returned in terms of the rules of unjustified enrichment in accordance with § 812 BGB. But German Courts assume the power to substitute a fair price in some cases, instead of declaring the contract void. So for example in terms of lease agreements courts will often substitute the excessive price with a market price.[99] The illegality of a contract deemed to be usurious under § 138 BGB carries severe consequences for the advantaged party. He can for example be held liable for any damages caused by his illegal conduct,[100] and would in some cases be at risk of not being able to claim back the value of his performance at all.[101]

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[93] Markesinis et al *Law of Contract* 248; T Ackermann & J-U Franck "Validity" in S Leible & M Lehmann (eds) *European Contract Law and German Law* (2014) 167 215; BGH, BGHZ 135, 269-270.
[94] Armbrüster in *MüKo* § 138 [114]; BGH, NJW 2014, 1652.
[95] Van Loo *Vernietiging* 272; see for example BGH, NJW 1985, 3006, in which a 77-year old contracting party sold the family house at an undervalue, with the condition that she could live in the house free of charge until her death; see similarly BGH, NJW 2001, 1127.
[96] Van Loo *Vernietiging* 270; see BGH, NJW-RR 1998, 1065.
[97] Zimmermann *Obligations* 176; This position is controversial, see generally R Zimmermann *Richterliches Moderationsrecht oder Totalnichtigkeit* PhD Thesis University of Hamburg (1979); H Kötz *European Contract Law* 2 ed (transl G Mertens & T Weir, 2017) 117.
[98] Compare and contrast: Dawson (1937) *Tulane LR* 50, 54 and Dawson (1976) *HLR* 1056 n 31, 1068.
[99] Markesinis et al *Law of Contract* 250.
[100] Dawson (1937) *Tulane LR* 54.
[101] Zimmermann *Obligations* 176; Markesinis et al *Law of Contract* 251-252.

3 3 6 Conclusion

Though it was clearly not the intention of the drafters of the BGB, and even though the BGH rejected such an approach in 1981,[102] and in recent judgments reiterated the position that the requirement of a reprehensible character is indispensable,[103] it seems that German law is moving closer to the position where, by itself, gross disproportion (*grobes Missverhältnis*) is indeed enough for the contract to be invalid.[104] In outcome, if not in form, this seems to resemble yet another revival of the doctrine of *laesio enormis*.[105]

We have also seen that application of § 138 (1) and (2) BGB is both flexible and far-reaching. German courts have also shown themselves as willing in some instances to complete contracts on behalf of the parties, such as in the case of a fair rental price being substituted into a contract. Where necessary, the courts have also adapted the remedy through a purposive interpretation of the open norm found in § 138 (1) BGB.

3 4 Austrian law

3 4 1 Introduction

Unlike in Germany, there was no attempt to abolish *laesio enormis* during the codification of the Austrian Civil Code ("ABGB"). Among the civil codes compiled during the 19th century, the ABGB went the furthest in its incorporation of the doctrine of *laesio enormis*.[106] There were suggestions that the scope of application should be restricted to contracts of sale, or only to goods worth more than a certain amount.[107] Ultimately, however, *laesio enormis* was included with a broad scope of application, but with a number of exceptions.

[102] See BGH, NJW 1981, 1206 para b, where the BGH rejected the judgment in OLG Stuttgart, NJW 1979, 2409 that an especially gross disproportion is enough by itself to void a contract, noting that this would otherwise amount to a reintroduction of the doctrine of *laesio enormis.*
[103] See Armbrüster in *MüKo* § 138 [116]; BGH, NJW 2010, 363, para 6.
[104] Kötz *Contract Law* 112; Van Loo *Vernietiging* 277.
[105] Kötz *Contract Law* 112.
[106] 111.
[107] Van Loo *Vernietiging* 88.

§ 934 ABGB allows a prejudiced party to avoid a bilateral contract if the prejudice suffered is equal to more than half of the value of his own performance. The provision reads:

> "If in a bilaterally binding contract one party receives consideration equal to less than one-half of what he has given, based upon common value, such party may demand the rescission of the contract and the restitution of the status quo. The other party, however, may preserve the contract provided he makes up the deficiency, according to the common value. The disproportion of the value is to be determined as of the moment when the contract was made."[108]

Although § 935 ABGB determines that the remedy cannot be excluded contractually, the provision excludes the application of the remedy in a number of situations:

> "[The application of § 935 ABGB cannot be excluded contractually; it is nevertheless not applicable when someone has declared that] the property is accepted at an extraordinary valuation for personal reasons;[109] where a party knowing the real value has nonetheless consented to the disproportionate valuation; where it can be presumed from the relationship between the parties that they intended to conclude a mixed contract consisting of both onerous and gratuitous obligations; where the real value can no longer be ascertained; and, lastly, where the property has been sold by the court in public auction."[110]

Austrian law does, however, contain a second rule that can be said to function as a fair price rule. While § 934 ABGB avoids contracts solely on the basis of objective discrepancy, § 879 (2)4 ABGB declares *contra bonos mores*, grossly disproportionate contracts that are concluded through exploiting the strained financial situation, lack of experience, or excited state of mind of the disadvantaged party.[111] § 879 (2)4 thus functions in a relatively similar fashion to § 138 BGB.[112] This part of the current study focuses on § 934 ABGB, but it is important to keep § 879 (2)4 in mind, as it can be applied in many of the situations where § 934 ABGB is explicitly excluded, and where the disproportion is striking, yet falls below 2:1.[113]

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[108] The translation is from PL Baeck *The General Civil Code of Austria* (1972) 179.
[109] Baeck translates *besonderer Vorliebe* as "personal reasons". This might be better understood as a personal "fondness", "preference", or "affection".
[110] The translation is from Baeck *Civil Code of Austria* 179. The first sentence of the provision has however been amended after the translation of Baeck, and was therefore adjusted accordingly by the author.
[111] See R Bollenberger in H Koziol, P Bydlinski, & R Bollenberger (eds) *ABGB Kurzkommentar* 5ed (2017) § 879 [5], [18]-[21].
[112] See 3 3 3 above.
[113] See Bollenberger in *Kurzkommentar* § 879 [18]; see 3 4 3 and 5 3 below.

An amendment to § 935 ABGB in 1979 prohibited the exclusion of the remedy of *laesio enormis* by express waiver. Prior to the amendment, a term waiving the remedy was in practice included in almost all standard term contracts. The remedy was therefore hardly ever applied.[114] Since then it has become a powerful remedy, especially in the field of consumer protection.[115] § 351 of the Austrian *Unternehmensgesetzbuch* (Code of commercial law), which enjoys preference over the general rule, determines that the application of § 934 ABGB can be excluded in commercial contracts, but only to the disadvantage of the commercial party. In this case it will accordingly only be available to the consumer.[116]

3 4 2 Calculating the disproportion: A fixed ratio

The value of the respective performances is estimated with the help of an expert (*Sachverständige*), even in matters where the performance itself is not expensive.[117] A geometric method is used to calculate whether *lesion* is present, whereby the relation between the two performances is measured. The seller is prejudiced if for a thing worth 10 Euro, he receives less than 5; the buyer is prejudiced if, for a thing of the same value (i.e 10 Euro), he pays more than 20 (and not only more than 15 as the argument of Voet[118] would have it).[119]

§ 934 ABGB speaks of a disproportion between the value of the *merx* (*gemeiner Wert*) and the value of the performance. The value of a thing, according to § 304 ABGB, is generally its price,[120] and if a court is called upon to estimate the value of a thing it should be expressed by way of an amount in money. According to case

[114] Baeck *Civil Code of Austria* 179; W Posch *Contract Law in Austria* (2015) 98.
[115] Posch *Contract Law in Austria* 98 n 299; Art 4:109 PECL, Comment 3.
[116] This provision formerly determined that any person who engages in a commercial transaction cannot challenge a contract on the basis of § 934 ABGB (*Derjenige, für den der Vertrag ein Handelsgeschäft ist, kann ihn nicht nach § 934 ABGB wegen Verkürzung über die Hälfte anfechten*.) The newer provision thus expanded the field of application of *laesio enormis*.
[117] M Winner *Wert und Preis im Zivilrecht* (2008) 48; Van Loo *Vernietiging* 213.
[118] See above 2 5 2 3.
[119] Winner *Wert und Preis* 48.
[120] See also B Eccher & O Riss in *Kurzkommentar* § 304 [1].

law,[121] and the majority of modern academic writing, the value of a thing should be measured by its market price.[122]

The onus of proving that the disproportion (*Missverhältnis*) between the performance and the value of the goods is more than one half lies with the party raising *laesio enormis*.[123] The value of the respective performances is to be measured as they were at the time of contract conclusion.[124]

3 4 3 Scope of application of the remedy

§ 934 ABGB is a general contractual remedy, and as such can be applied broadly, not only to contracts of sale, but also to contracts for the provision of a service, and other bilateral contracts.[125] Expressly excluded from the application of the remedy are (out of court) settlement agreements,[126] and goods whose real value cannot be determined.[127] Examples of the latter might be where the (non-generic) *merx* has been adapted or destroyed after the conclusion of the contract; or cases where no market exists for the *merx* and accordingly it is impossible to ascertain the value thereof, such as a painting by a yet unknown artist,[128] or where a monopoly is held in a certain market.[129]

3 4 3 1 Contracts containing an element of chance

Further excluded from the operation of § 934 ABGB are contracts which contain an element of chance, so called *Glücksverträge*.[130] A contract is considered to be a *Glücksvertrag* when the benefit that is stipulated for is of a still uncertain or speculative nature.[131] There is some debate as to whether such contracts should be

[121] See recently OGH 30.6.2005, 3 Ob 324/04z.
[122] Winner *Wert und Preis* 49; F Bydlinski *Privatautonomie und objektive Grundlagen des verpflichtenden* (1976) 154; M Hinteregger "Contracts" in C Grabenwarter & M Schauer (eds) *Introduction to the Law of Austria* (2015) 59 67.
[123] P Bydlinski in *Kurzkommentar* § 934 [1].
[124] See § 934 ABGB; Bydlinski in *Kurzkommentar* § 934 [1].
[125] Van Loo *Vernietiging* 216.
[126] § 1386 ABGB.
[127] § 935 ABGB.
[128] Van Loo *Vernietiging* 213-214.
[129] See Winner *Wert und Preis* 57 for a discussion of the case of OGH 6 Ob 187/99i. In this case educational training had been provided to become a master in the slightly unconventional Japanese stress relieving technique of "Reiki". Due to the monopoly in the provision of training for this art form no comparison was available as to its value.
[130] § 1268 ABGB.
[131] § 1267 ABGB.

excluded where it is clear that despite some element of chance being present, the value of the respective performances are patently unequal nevertheless.[132] So for example the Austrian Supreme Court (*Oberster Gerichtshof* or "OGH") has ruled that, despite the aleatory nature of lifetime annuities,[133] which pay out on a regular basis until the date of a person's death, § 934 ABGB could be applied in such cases.[134] The courts have taken the approach that the value of the annuity could be estimated with the use of actuarial tables, and as such is ascertainable.[135] In an interesting case before the Viennese High Court (*Oberlandesgericht* or "OLG"), regarding the estate of a deceased man who had sold a house to his second wife in exchange for a lifetime annuity, the court found that the sale had impoverished the estate beyond the threshold of *laesio enormis*, and accordingly set it aside.[136]

3 4 3 2 Intention to donate

Further excluded from the remedy are so called "mixed contracts", where the intention of the contracting parties is part onerous and part gratuitous. An example of such might be a sale at a very high price with the intention that the excess is a partial donation.[137] The difference in this case between the renunciation of the remedy (which is prohibited), and a mixed contract, is that in the latter case it should be clear from the intention of the parties that they have concluded a different type of contract altogether in which an element of charity is inherent.[138] The intention to donate needs to be inferred from the relationship between the parties. Such an intention is for example often inferred by the courts from contracts between family members.[139] Not all contracts between family members include such intent, however, and such intent is not restricted to familial contracts either. Courts do not attach great weight to generic clauses stating any excessive amount above the value of the counter-performance to be a donation.[140]

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[132] Van Loo *Vernietiging* 217.
[133] § 1269 ABGB determines that lifetime annuities (*Leibrenten)* are considered *Glücksverträge.*
[134] OGH 30.5.1994, SZ 67/99.
[135] Van Loo *Vernietiging* 218.
[136] OLG Wien 10.9.1954 SZ 27/222; see Van Loo *Vernietiging* 218.
[137] § 935 ABGB.
[138] Winner *Wert und Preis* 53.
[139] Van Loo *Vernietiging* 227.
[140] 227.

This is apparent from a case before the OGH[141] which concerned a contract for the sale of an immovable property between two related parties (a niece and her aunt). The contract included a term stating that: "should the agreed-upon counter performance not correspond to the true value of the contractual real estate shares, then it is agreed that a donation to such an extent is at hand, which is accepted with gratitude by the buyer. The seller renounces any remedy or right to recover the donation on any ground whatsoever."[142] The court in this case found that there was indeed an intention to donate, but based this finding not on the abovementioned clause, but rather on the documentary evidence submitted to the court proving that there had been a strong and friendly relationship between the two parties.[143]

3 4 3 3 Personal affection

§ 935 ABGB further excludes from the operation of the remedy in the situation where a contracting party declares that he accepts the extraordinary value of the *merx* due to personal affection (*besondere Vorliebe)*. To some this might seem to fulfil a similar function as the erstwhile, but now prohibited, waiver or renunciation of the remedy.[144] In case law Austrian courts have excluded the application of the remedy on a number of occasions where, although the *besondere Vorliebe* was not explicitly declared by the prejudiced party, the court inferred it from the circumstances of the conclusion of the contract.[145]

On the other hand, the mere declaration that an extraordinary price is accepted for personal reasons, for example in the form of a standard term to this effect would not suffice.[146] This would be too similar to the abovementioned renunciation of the remedy, and would be lacking in credibility. Per definition, a *besondere Vorliebe* does not lend itself readily to generalisation.[147]

[141] OGH 14.4.1998 6OB518/88.
[142] Translated by the author.
[143] Van Loo *Vernietiging* 227.
[144] Winner *Wert und Preis* 56.
[145] See 56-58 for an overview of these cases.
[146] Van Loo *Vernietiging* 224.
[147] 224.

3 4 3 4 Knowledge of the true value and mistake

Lastly § 935 ABGB excludes the remedy where a party knowing the real value of the *merx* has nonetheless consented to the disproportionate price. Such exclusion seems rather reasonable. Why should the provision protect a party who knowing the true value of a good or service nevertheless sells it at a considerable undervalue, or *vice versa*?

One answer could be that there are situations where parties are forced by their circumstances to engage in transactions while knowing full well that such a transaction is disadvantageous. Parties could be coerced to sell a good at considerable undervalue because they are in dire need of money, or may have no other alternative to purchase a necessary good, even at a extortionate price. These aspects do not need to be discussed here as Austrian law, similarly to German law, is able to provide relief to disadvantaged parties in these cases through declaring such contracts *contra bonos mores* under § 879 (2)4 ABGB.

What is meant then by requiring that the disadvantaged party knew the real value of the *merx*? Constructive knowledge of the true value, i.e. that the party ought to have known, or could have ascertained with careful investigation what the goods are worth does not suffice; positive knowledge is required.[148] Neither will the mere declaration that the parties are aware of the true value of the goods suffice.[149] A party should actually know the market price of the good, and not merely have an idea of what the market price could be.[150]

3 4 3 5 Onus of proving the exclusion of § 934 ABGB

The onus of proving that the disadvantaged party had knowledge of the true value of the *merx*, that they paid the higher price due to personal affection for the *merx*, or that the disadvantaged party intended the excess as a donation, lies on the advantaged party seeking to enforce the contract.[151]

[148] P Bydlinski "Die Stellung der Laesio Enormis im Vertragsrecht" (1983) 105 *JBL* 410 417; Van Loo *Vernietiging* 227; Winner *Wert und Preis* 52.
[149] Van Loo *Vernietiging* 227.
[150] Winner *Wert und Preis* 52 n 161.
[151] 58.

3 4 4 Effect of the remedy

If the requirements for the remedy are met, § 934 ABGB, similar to the Roman and Roman-Dutch doctrines of *laesio enormis*, grants the advantaged party an election (a so called *facultas alternativa*) to negate the invalidation of the contract (i.e. to enforce the contract); in the case of a prejudiced seller, the advantaged party would pay up to the full "true value" of the performance, in the case of the prejudiced purchaser the contract price would be reduced to the true value of the *merx*.[152] Thus the contract price is adapted to the full price in order to save the contract. § 934 ABGB however does not allow for the judicial adaptation of the contract in a manner similar to § 138 BGB,[153] or the model rules.[154]

3 4 5 Conclusion

The approach followed in Austrian law under §§ 934 and 935 ABGB is innovative in a number of respects, which has led to the remedy of *laesio enormis* enjoying a relatively broad and general application.

Not only can the remedy not be excluded to the detriment of the consumer, but courts have also recognised that little weight should be attached to standard terms which have the aim of excluding the remedy through either declaring that the contracting parties know the true value of the performances, that any excess should be regarded as a donation, or that the extraordinary price is accepted for personal reasons.[155] When one of the abovementioned exceptions to the application of § 934 ABGB is raised, the enforcing (advantaged) party bears the burden of proof. All of these measures are aimed at assisting disadvantaged contracting parties in obtaining relief.

In other difficult cases where the value of the performance is not exactly ascertainable, such as contracts involving a measure of chance, the pragmatic approach followed by Austrian courts has allowed the remedy to be applied

[152] Bydlinski in *Kurzkommentar* § 934 [4].
[153] See above 3 3 5 above.
[154] See above 3 7 3 below.
[155] See 3 4 2 above; Van Loo *Vernietiging* 224; Bydlinski (1983) *JBL* 418.

nevertheless.[156] These considerations have led to the scope of application of *laesio enormis* being broad and becoming even more so in modern Austrian contract law.

However, the remedy suffers from a measure of inflexibility and arbitrariness when compared to the more supple approach followed in Germany and the model rules.[157] This rigidity adds to the simplicity of its application,[158] but also means that the remedy is rather blunt and lacking in nuance when it comes to adaptation of the contract. The remedy suffers accordingly also from the same inflexibility as the classical doctrine of *laesio enormis* due to its all or nothing nature.

3 5 Louisiana Law

3 5 1 Introduction

The focus now shifts to the American state of Louisiana, a jurisdiction which, like Germany and Austria, has codified its private law, but which has adopted a different approach to *laesio enormis*, and hence could provide further comparative perspectives. This jurisdiction generally shares with the South African law of contract the characteristic that it is not purely civilian, and has to some extent been influenced by the common law, which means it can be described as "mixed" in nature.[159] However, in the context of *laesio enormis*, the substantive law of Louisiana is essentially civilian in character. The example of Louisiana therefore provides access to alternative civil-law approaches, especially that of French law. It also illustrates how the application of the civilian doctrine of *laesio enormis* can function in a modern judicial system based on the common law model.[160]

3 5 2 History of the Louisiana Civil Code

Louisiana's mixed legal system originated with the purchase of the Louisiana territory from France by the United States of America in 1803, at which time the legal system consisted of a mixture of French and Spanish customs and laws.[161]

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[156] See 3 4 3 1.
[157] Discussed at 3 7 below.
[158] Van Loo *Vernietiging* 212.
[159] See CK Odinet "Commerce, Commonality, and Contract Law: Legal Reform in a Mixed Jurisdiction (2015) 75 *Louisiana LR* 741 745-746; VV Palmer & H Borowski "Louisiana" in VV Palmer (ed) *Mixed Jurisdictions Worldwide* 3 ed (2012) 277 277-285.
[160] See 285.
[161] Odinet (2015) *Louisiana LR* 751.

Congressional Acts in 1803 and 1804, as well as the 1808 Louisiana Civil Code retained the existing civilian private law of the territory, leading to the start of the mixed legal system as it is known today.[162] An in depth discussion of the history of the legal system goes beyond the scope of this enquiry, but it is sufficient to note for the current comparison that (like South Africa) the legal system consists of a substantive civilian private law overlaid with a structure of executive, legislature, and judiciary,[163] which is based on the common law model.[164]

In the compilation of the Civil Code, Louisiana was primarily influenced by French, and to some extent Spanish law. Accordingly, many of the provisions in the modern Civil Code still resemble provisions from the French *Code Civil* of 1804.[165] The 1808 Louisiana Digest and the Civil Codes of 1825 and 1870 recognised a fair price rule in the form of a restricted version of the doctrine of *laesio enormis*.[166] The doctrine is called lesion beyond moiety in Louisiana, and it is under this heading that it appears in the Civil Code.

3 5 3 The doctrine of *laesio enormis* in France

Since lesion beyond moiety in Louisiana was received from the French *Code Civil* of 1804, a brief overview of the history of the doctrine in France is required in order to understand the form that the remedy takes today.

The influence of Pothier on the French *Code Civil* is well-documented, and this influence carried over into the Louisiana Civil Code as well.[167] It was briefly noted in the previous chapter that Pothier conceived of the remedy of *laesio enormis* as arising due to an implied defect in consent.[168] Pothier's conception of lesion as the result of an implied error is also clear in Article 1860 of the Louisiana Civil Code of 1870, which provided that:

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[162] Palmer & Borowski "Louisiana" in *Mixed Jurisdictions* 277-278, 281.
[163] See especially, 285-287, 290-292.
[164] 277-281.
[165] Odinet (2015) *Louisiana LR* 750, 751.
[166] See D Tooley-Knoblett & D Gruning "Chapter 13: Lesion Beyond Moiety" in D Tooley-Knoblett & D Gruning (eds) *Sales: Volume 24 Louisiana Civil Law Treatise Series* (2017) § 13:1.
[167] AD Parker "Comments on the Civil Code" (1929) 4 *Tulane LR* 73 76; Tooley-Knoblett & Gruning "Lesion" in *Sales* § 13:3.
[168] See 2 5 5 above; see also Gordley *Origins* 101.

> "Lesion is the injury suffered by one who does not receive a full equivalent for what he gives in a commutative contract. The remedy given for this injury is founded on its being the effect of implied error or imposition: for, in every commutative contract, equivalents are supposed to be given and received."[169]

Interestingly though, this implied error is conclusive, and does not have to be proven as a distinct requirement; it is a fiction that exists even where the seller expressly declares that he knows that the true value of the property is more than twice the contract price.[170]

While the doctrine of *laesio enormis* formed part of French law during the *ius commune*,[171] it was temporarily suspended by the post-revolutionary government, since hyperinflation had made the value of money too unstable and therefore led to a multitude of lawsuits by sellers of land who were now in possession of "worthless paper money."[172] The remedy was, however, not eliminated in its entirety (as is incorrectly stated by Odinet),[173] but was soon reinstated when the hyperinflation abated.[174] During the subsequent drafting of the *Code Civil*, notable jurists such as Théophile Berlier, Charles Demolombe, and François Laurent argued that the remedy should be abolished as the value of a thing is not absolute but relative, and that the just price therefore depends only on the will of the parties.[175] It is ironic that the doctrine was suspended during this period, because a situation where sellers of land have not received sufficient consideration is exactly the type of crisis for which the doctrine was apparently invented in Roman law.

While this view seemed to gain the ascendancy, a restricted version of the remedy, only available to the seller of land, still found its way into the *Code Civil* at the urging of Napoleon.[176] Napoleon argued that since the price of land was more stable than other goods, and since land as a commodity was of great importance to

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[169] See also S Litvinoff "Vices and Consent, Error, Fraud, Duress and an Epilogue on Lesion" (1989) 50 *Louisiana LR* 1 29, on the relationship between error and *laesio enormis.*
[170] See the discussion in Parker (1929) *Tulane LR* 77.
[171] Tooley-Knoblett & Gruning "Lesion" in *Sales* § 13:3.
[172] Gordley (1981) *CLR* 1593 n 32, 1594; Tooley-Knoblett & Gruning "Lesion" in *Sales* § 13:3; Litvinoff (1989) *Louisiana LR* 109.
[173] Odinet (2015) *Louisiana LR* 778.
[174] Gordley (1981) *CLR* 1593 n 32.
[175] 1593, 1594 n 33.
[176] Gordley & von Mehren *Private Law* 464.

society,[177] the manner in which one disposed of it deserved special rules, lest contracting parties spoil their inheritance or patrimony through an impulsive transaction.[178] While Article 118 of the *Code Civil* thus contains the general rule that contracts cannot be invalidated on the basis of *laesio enormis*; Article 1674 determines that the remedy is available to the seller of immovable property sold at less than five-twelfths of its fair value.[179]

3 5 4 Lesion beyond moiety in the Louisiana Civil Code

3 5 4 1 Availability of the remedy

Article 1965 of the Louisiana Civil Code today determines simply that: "A contract may be annulled on grounds of lesion only in those cases provided by law." In addition to the sale of an immovable, regulated in Article 2589,[180] Louisiana law provides that the remedy is available in the case of an extrajudicial partition,[181] meaning a situation where co-owners enter into an agreement terminating their co-ownership,[182] and also in the case of exchange,[183] but is specifically limited to a contracting party exchanging an immovable for "property", which can include movables or immovables, whether corporeal or incorporeal.[184] Lesion in the case of exchange is foreign to French law,[185] and was thus a novel invention. The scope of this article used to be limited to even more specific exchanges before a 2010 revision, which gave it the more general application it currently enjoys.[186]

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[177] Gordley & von Mehren *Private Law* 464; PA Fenet *Recueil complet des travaux préparatoires du Code Civil* (1836) 57-58.
[178] Gordley & von Mehren *Private Law* 464; Gordley (1981) *CLR* 1593 n 32.
[179] Gordley (1981) *CLR* 1593; Litvinoff (1989) *Louisiana LR* 105.
[180] Art 2589: "Rescission for lesion beyond moiety. The sale of an immovable may be rescinded for lesion when the price is less than one half of the fair market value of the immovable. Lesion can be claimed only by the seller and only in sales of corporeal immovables. It cannot be alleged in a sale made by order of the court."
[181] See Art 814 Louisiana Civil Code.
[182] Tooley-Knoblett & Gruning "Lesion" in *Sales* § 13:2 n 2.
[183] See Art 2663 Louisiana Civil Code.
[184] Tooley-Knoblett & Gruning "Lesion" in *Sales* § 13:23; Art 2663 Louisiana Civil Code, Revision Comment (b).
[185] See Litvinoff (1989) *Louisiana LR* 109-110; Tooley-Knoblett & Gruning "Lesion" in *Sales* § 13:23.
[186] Among other things, the consideration received in return for the immovable had to be either movables, or another immovable with the balance paid in movables. While allowing lesion in the case of exchange is welcomed, this limitation seems somewhat arbitrary; see Art 2663 Revision Comments (a)-(c).

With regards to sale, the remedy is true to its French roots, only being available to a contracting party who sells corporeal immovable property.[187] The remedy is thus available in the sale of land, buildings, standing timber, and individual units in a condominium, but not in the case of servitudes[188] or mineral leases.[189] This position appears to be rather archaic. While immovables might once have been important enough to deserve special protection, it is unclear why this limitation persists to this day.

The remedy is also not available in the case of a sale involving an element of risk, as it supposedly makes it difficult to determine the true price.[190] This is true even in cases where the seller reserves some right in the land, such as a lifelong usufruct, as the sale is then deemed to involve chance.[191] In cases such as *Fernandez v Wilkinson*[192] the court found that the lesion beyond moiety is not available when a sale is speculative in nature. In the much older case of *Parker v Talbot*,[193] the court was presented with an example typical of such a sale, where an elderly woman sold her house at a very low price but reserved a usufruct on the property during her lifetime. The court, citing the prevailing practice in France at that time, left the door open for aleatory contracts to be rescinded where the disproportion between the performances is immense.[194]

While it is sensible to exclude speculative agreements from the application of the remedy if it is impossible to determine the true value of the contract, the experience in Germany and Austria has shown that it is sometimes easy to prove the value of a transaction with the help of modern actuarial techniques. Insofar as the burden of proof lies on the party seeking rescission of the contract, a more flexible approach which allows for some discretion in this manner seems preferable.[195]

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[187] See Litvinoff (1989) *Louisiana LR* 110 for a discussion of this restriction.
[188] The remedy was available in the case of servitudes in France; see LH Rosenson "Comments" (1940) 14 *Tulane LR* 249-263.
[189] Tooley-Knoblett & Gruning "Lesion" in *Sales* § 13:7
[190] § 13:10.
[191] § 13:10.
[192] *Fernandez v Wilkinson* Sup.1925, 158 La. 137, 103 So. 537.
[193] *Parker v Talbot* 37 La. Ann. 22 (1885) para 23.
[194] Para 24.
[195] See the discussion on contracts involving an element of chance in Austrian law above at 3 4 3 1.

3 5 4 2 Proving the price is too low

As shown above,[196] Article 2589 allows for rescission when the contract price is less than half of the "fair market value" of the immovable. The respective articles for partition[197] and exchange[198] also refer to the 'fair market value". The 1870 Civil code simply referred to the "value", which is more ambiguous than "fair market value". Tooley-Knoblett and Gruning note regarding this distinction that: "[S]ome earlier cases tried to apply a notion of 'intrinsic' value [presumably as opposed to market value], without success."[199] However, there is no indication from the sources cited by Tooley-Knoblett and Gruning that the courts in Louisiana have ever made use of intrinsic worth as opposed to the market value of the *merx* to assess whether there was lesion beyond moiety.

Whether or not the price is less than half the fair market value of the *merx* is a question of fact. The burden of proof lies on the seller (the party who brings the action for *lesion*), and should in theory be decided on a balance of probabilities,[200] as in other civil cases.[201] However, it seems that the courts often require that a higher burden of proof must be satisfied, due to the exceptional nature of the remedy. In *Haruff v King,*[202] for example, the Court of Appeal of Louisiana found that the seller must "prove the value of his property by 'clear and exceedingly strong' evidence."[203] Satisfying such a burden would require showing that the disputed fact is "highly probable, that is, much more probable than its nonexistence."[204] This is not a new development, however, as such language is present in much older cases. In *Mayard v Laporte*[205] the court stated, for example, that:

> "Even if the evidence were sufficient to make out a probable case in favor of plaintiff, we should still be compelled to decide against her. The law is well settled that in such cases it is not sufficient to make out a merely probable case, but that the proof must be positive."

[196] See n 180.
[197] See n 181.
[198] See n 183.
[199] Tooley-Knoblett & Gruning "Lesion" in *Sales* § 13:6 n 1.
[200] This is referred to as "a preponderance of evidence" in Louisiana.
[201] Tooley-Knoblett & Gruning "Lesion" in *Sales* § 13:6.
[202] La. App. 3 Cir. 5/14/14, 2014 WL 1911008 (La. Ct. App. 3d Cir. 2014).
[203] Para 7.
[204] Para 7.
[205] 109 La. 101, 33 So. 98 (1902) 101-102.

The court also cited the even older case of *Demaret v Hawkins*[206] which stated that:

> "The right to rescind a sale for lesion beyond moiety is the only restraint on the liberty of the citizen to bind himself or his property according to the dictates of his own judgment, and the evidence relied on to establish that right should be peculiarly strong and conclusive."

Parker notes similarly that since the remedy of lesion beyond moiety is based on a conclusive presumption of error on the part of the disadvantaged party, strong proof must exist for the action to succeed.[207] This burden is clearly more onerous than in other civil cases, and might therefore act as a form of control, ensuring that a large number of contracts are not invalidated through the remedy by placing a stricter burden of proof on the party alleging invalidity.

3 5 4 3 Renunciation of the remedy

Article 2589 of the Civil Code determines that the remedy may be invoked by the seller, even if he has renounced the right to claim it. Tooley-Knoblett and Gruning correctly point out, like the late scholastics,[208] and Pothier before them,[209] that the remedy would be largely illusory if it could be renounced at the time of conclusion of the contract.[210] They argue however, like Pothier,[211] that a renunciation which occurs after the payment of the contract price, and the delivery of the thing, should be binding, in the same way that a party induced into entering a contract through misrepresentation is able to later confirm a contract.[212] This position seems to reflect an understanding of *laesio* enormis as a defect in consent. Insofar as renunciation of the remedy which occurs after the conclusion of the contract is less open to abuse than renunciation at contract conclusion, it is to be preferred.

It is also possible to avoid the application of the remedy through showing that the sale was in fact an onerous donation; but in order for the court to accept this, the

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[206] Demaret v Hawkins 8 La. Ann. 483 (1852) 484.
[207] Parker (1929) *Tulane LR* 77.
[208] See above at 2 4 3 4.
[209] RJ Pothier *Treatise on the Contract of Sale* (transl LS Cushing, 1999) 355
[210] Tooley-Knoblett & Gruning "Lesion" in *Sales* § 13:12.
[211] Pothier *Contract of Sale* 355.
[212] Tooley-Knoblett & Gruning "Lesion" in *Sales* § 13:12.

buyer would have to show that the transaction meets the requirements in form and intent for a valid donation.[213]

3 5 4 4 Prescription of the remedy

The 1985 revision of the Sales Law significantly shortened the period for which the remedy is available; an action nowadays has to be brought within one year from the time of the sale, as opposed to four in the predecessor article. In addition, this period can no longer be interrupted or suspended.[214] While this might seem to indicate that lesion beyond moiety "lost ground" in the revision,[215] such a limitation also makes sense as a method to limit the legal uncertainty sometimes associated with the doctrine.

3 5 4 5 Effect of the remedy

If the seller successfully relies on the remedy, the buyer either has the option to return the thing (and in turn receive repayment of the lesionary price), or supplement the lesionary price up to the fair market price.[216]

3 5 5 Conclusion

Odinet attributes the survival of the doctrine of lesion beyond moiety in Louisiana civil law to the tendency of mixed jurisdictions to resist change by anchoring themselves in the traditional and well-known, thus retaining certain aspects of their law, even when they are in conflict with new laws or legal regimes.[217] In Louisiana this has manifested itself as a struggle to retain its civilian identity,[218] and accompanying legal figures such as lesion beyond moiety.[219] This has not only led to the doctrine being retained, but also to it remaining largely unchanged from its rigid and restricted form as it was adopted from French law, even if the underlying logic of these restrictions is no longer present.[220] This has happened despite the nature of Louisiana's economy changing since the adoption of the doctrine from a rural

[213] See Odinet (2015) *Louisiana LR* 776.
[214] See Art 2595 Louisiana Civil Code; see also Tooley-Knoblett & Gruning "Lesion" in *Sales* § 13:24.
[215] Tooley-Knoblett & Gruning "Lesion" in *Sales* § 13:24.
[216] § 13:13.
[217] Odinet (2015) *Louisiana LR* 750.
[218] 751.
[219] 788.
[220] 775, 780.

agrarian society[221] (perhaps necessitating special rules for land as the most important asset, or indicator of wealth),[222] to a much more complex and diversified modern economy, where other assets such as movables, stocks or bonds, and incorporeals such as intellectual property, are arguably just as important.[223]

A surprisingly visionary article published already in 1940 called for the creation of a general lesionary concept, available to both parties, for movables, and immovables, and all commutative contracts, with a shortened period of prescription, which does away with the crude and inflexible arithmetic of the doctrine in favour of a more flexible standard.[224] Such a reform has not occurred.

3 6 English Law

3 6 1 Introduction

The traditional view in the English common law is that a contract must be supported by "consideration" (i.e. there must be some *quid pro quo*),[225] but that consideration need not be adequate to render the contract enforceable.[226] At least on a formal level, there is no rule or principle, written or unwritten, which can be equated to a fair price rule.[227] While this can in part be attributed to a liberal approach to contract, it also suggests that there might be other mechanisms which deal with inequality in exchange.

The statement of the court in *Sturlyn v Albany*[228] that "when a thing is done, be it never so small, this is a sufficient consideration to ground an action", is often (mis)understood to mean that courts as a rule cannot examine the adequacy of the consideration. This rule was, however, not meant to prohibit judges from granting relief in cases of hard bargains, but rather to allow judges to enforce gratuitous contract, such as partial donations, where equal consideration is not intended.[229]

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[221] 754.
[222] 787.
[223] 787.
[224] See Rosenson (1940) *Tulane LR* 249-263.
[225] E McKendrick *Contract Law* 11 ed (2015) 69.
[226] McKendrick *Contract Law* 70; Gordley & von Mehren *Private Law* 466.
[227] See Kötz *Contract Law* 113; H Beale, B Fauvarque-Cosson, J Rutgers, D Tallon, & S Vogenauer *Cases, Materials and Text on Contract Law* 2 ed (2010) 582.
[228] *Sturlyn v Albany* Cro. Eliz 67, 78 Eng. Rep. 327 (QB 1587).
[229] Gordley & von Mehren *Private Law* 466.

While the English common law lacks a general principle allowing a party to escape from a prejudicial deal, it has a patchwork of different rules, which in an assortment of circumstances grant the weaker party protection that in some respects is comparable to that afforded in the continental systems.[230]

3 6 2 Unconscionable bargains

English courts of equity enjoy the power to provide relief from contracts which are so harsh as to be unconscionable.[231] Courts of equity have in the past given relief from harsh bargains without making use of, or establishing, a principle that there needs to be equality in exchange.[232] Instead the courts have made use of a variety of other arguments such as that an agreement is unreasonable, unjust, inequitable, or grossly inadequate, and so forth.[233] Although there have been some attempts to establish general requirements that have to be met in order for relief to be granted in these cases, it seems clear that inequality in exchange, or the existence of an unfair bargain, is not enough.[234] It seems also that such agreements might be unconscionable not because the substance of the contract is objectionable in itself, but rather because of reprehensible behaviour of the stronger party.[235]

This was typically the case where young heirs had sold their inheritance at a pittance in order to finance their lifestyle or gambling debts;[236] or where courts gave assistance to those who had bought land at a very high price brought about by the South Sea Bubble.[237] English courts were arguably less concerned about equality in exchange than they were about the reckless disposal of inheritances and estates in many of these cases.[238]

These cases can also be linked to the more modern case of *Cresswell v Potter*,[239] where the Court of Chancery gave relief to a telephonist who had disposed of her rights in a shared property cheaply in return for exemption from further liability under

[230] See Kötz *Contract Law* 113.
[231] Gordley & von Mehren *Private Law* 466.
[232] 466.
[233] 467.
[234] See Beale et al *Contract Law* 590.
[235] 590.
[236] Kötz *Contract Law* 113; Gordley & von Mehren *Private Law* 467.
[237] Gordley & von Mehren *Private Law* 467
[238] 467
[239] (1978) 1 WLR 255 Ch.

the mortgage.[240] The court, drawing on the case of *Fry v Lane*,[241] noted that in order for the contract to be set aside, the requirements are that the disadvantaged party had to be poor and ignorant, that the sale had to be at a considerable undervalue, and there should have been no independent advice.[242] In *Credit Lyonnais Bank Nederland NV v Burch*[243] the Court of Appeal stated in similar fashion, also with reference to *Fry v Lane*, that: "Equity's jurisdiction to relieve against such [unconscionable] transactions, although more rarely exercised in modern times, is at least as venerable as its jurisdiction to relieve against those procured by undue influence." Despite some doubt as to the jurisdiction of courts to set aside such unconscionable bargains, courts have continued to grant relief on this somewhat uncertain basis.[244]

3 6 3 Economic duress

Modern English law acknowledges economic duress (in addition to duress to the person, and duress of goods) as a form of duress that renders a contract voidable.[245] This is the case where a party uses their stronger bargaining position to coerce the other party in an illegitimate manner to agree to certain contractual terms.[246] What exactly constitutes unconscionable or unlawful pressure is contested.[247] A flexible approach, whereby a range of factors are taken into account, was advocated for in *DSDN Subsea Ltd v Petroleum Geo Services*.[248] In *Universe Tankships Inc of Monrovia v International Transport Workers Federation, The Universe Sentinel*,[249] the House of Lords held that whether a threat is illegitimate depends on the nature of the threat and the nature of the demand. This might for example be the case where one of the parties agrees to an extortionate price, or to a disadvantageous modification of the contract, only because the counterparty threatened to breach the contract

[240] Gordley & von Mehren *Private Law* 471; Kötz *Contract Law* 113-114.
[241] (1888) 40 Ch.D 312.
[242] Gordley & von Mehren *Private Law* 469.
[243] (1997) 1 All E.R. 144 151.
[244] McKendrick *Contract Law* 304; see also *Boustany v Piggott* (1995) 69 P & CR 298,
[245] McKendrick *Contract Law* 293-294; *The Siboen and The Sibotre* (1976) 1 Lloyd's Rep 293 294.
[246] McKendrick *Contract Law* 294; Kötz *Contract Law* 113.
[247] See McKendrick *Contract Law* 295-297.
[248] ASA (2000) BLR 530, 545.
[249] (1983) AC 366.

otherwise.[250] Some cases where relief is provided through fair price rules in other legal systems might therefore be dealt with through the doctrine of economic duress in English law. This doctrine is closely related to, and often overlaps with undue influence.

3 6 4 Undue influence

The doctrine of undue influence was received into South African law from English law.[251] The close relation to duress and the nature of the doctrine is well illustrated by Lord Hoffman in *R v Attorney-General for England and Wales*:[252]

> "Like duress at the common law, undue influence is based upon the principle that a transaction to which consent has been obtained by unacceptable means should not be allowed to stand. Undue influence has concentrated in particular upon the unfair exploitation by one party of a relationship which gives him ascendancy or influence over the other."

Undue influence is a ground of relief developed by the courts of equity,[253] and thus developed distinctly from the doctrine of duress.[254] It allows for the avoidance of a contract where a party can show that the contract was concluded due to undue pressure or influence exerted by the advantaged party.[255] Two categories of undue influence are recognised; actual and presumed. Actual undue influence includes "overt acts of improper pressure or coercion such as unlawful threats" and overlaps with duress as described above.[256] Presumed undue influence involves the abuse of a relationship of trust between two parties, in the course of which one has acquired a measure of influence over the other, of which they then take advantage.[257] Although not exactly similar, the latter, more subtle type of undue influence aligns better with

[250] Kötz *Contract Law* 113; Threats of breach of contract do not always amount to unlawful pressure however, see Beale et al *Contract Law* 555; see also McKendrick *Contract Law* 297 for a discussion of whether an additional element is required such as bad faith.
[251] While the origins of the term lie in English law, the substance of the doctrine differs in English and South African law; see D Hutchison "Improperly Obtained Consent" in D Hutchison & C-J Pretorius (eds) *The Law of Contract in South Africa* 3 ed (2017) 117 145-146.
[252] (2003) UKPC 22 para 21, by way of McKendrick *Contract Law* 299.
[253] *Royal Bank of Scotland v Etridge (No. 2)* (2002) 2 AC 773 para 6.
[254] McKendrick *Contract Law* 299.
[255] Kötz *Contract Law* 114.
[256] *Royal Bank of Scotland v Etridge (No. 2)* (2002) 2 AC 773 para 8.
[257] Para 8.

the doctrine of undue influence in South African law, where it is distinguished from duress by the absence of threats or intimidation.[258]

The importance of the distinction between actual and presumed undue influence lies in the requirement that a manifest disadvantage was required to be proven by the disadvantaged party only in the case of presumed undue influence.[259] A disadvantage is said to be manifest where it is apparent to a reasonable person who considered the transaction.[260]

A rebuttable presumption of undue influence can arise where a certain type of special relationship exists between the parties.[261] The importance of the role of presumption has been watered down due to the decision of the House of Lords in *Royal Bank of Scotland v Etridge (No. 2)*.[262] Lord Nicholls endorsed a more flexible test in the case, noting that the doctrine is not confined to cases of abuse of trust, but could also include cases where vulnerable persons are exploited, as well as other cases of reliance or dependence noted above such as duress of goods.[263] He also noted that the importance lay not in the form or type of the relationship, but rather on whether there was sufficient trust and confidence.[264] Lord Nicholls also casts doubt on the evidentiary value of the manifest advantage requirement. He argued that there may be several reasons why contracting parties could enter into manifestly disadvantageous contracts, which are not necessarily due to the exertion of undue influence.[265] Lord Nicholls advocated that the test should rather be whether the transaction in question is such that is "calls for explanation".[266] Such a flexible approach could prove useful in practice, and could well subsume many cases where inequality in exchange arises due to vulnerability or reliance, and where the disproportion is apparent enough to "call for an explanation".

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[258] See Hutchison "Improperly Obtained Consent" in *The Law of Contract* 146. Many cases of overt undue influence might rather be dealt with as cases of duress in South African law.
[259] McKendrick *Contract Law* 300; see also *National Westminster Bank plc v Morgan* (1985) AC 686.
[260] McKendrick *Contract Law* 300.
[261] See Hutchison "Improperly Obtained Consent" in *The Law of Contract* 146.
[262] (2002) 2 AC 773; see McKendrick *Contract Law* 300; Beale et al *Contract Law* 583.
[263] *Royal Bank of Scotland v Etridge (No. 2)* (2002) 2 AC 773 para 11.
[264] Para 10.
[265] Para 30.
[266] Para 31; see also McKendrick *Contract Law* 302.

3 6 5 Conclusion: A general doctrine of unconscionability?

Lord Denning attempted in *Lloyds Bank v Bundy*[267] to create a general ground of relief for weaker parties to prejudicial contracts based on an inequality in bargaining power. This doctrine would thereby subsume the doctrine of undue influence, as well as the category of unconscionable bargains discussed above.[268] Lord Denning[269] argued that a single thread ran through the relief given in all of these cases, in that it rests on the inequality of bargaining power. He noted that it is a matter of "common fairness" when one party is so strong, and the other so weak, that the stronger party should not be able to "push the weak to the wall".[270]

The arguments of Lord Denning have, however, not been met with approval. In later cases such as *Pao On v Lau Yiu Long,*[271] and *National Westminster Bank plc v Morgan*,[272] Lord Scarman has severely criticised the dicta of Lord Denning. He noted in the former case that contracts are not invalid simply because they have been procured by unfair use of a dominating bargaining position, and in the latter that there is no need for a principle as the lawgiver had already placed the necessary restrictions on freedom of contract to prevent abuse of inequality of bargaining power through statutes such as the Consumer Credit Act of 1974.[273]

As has been referred to in passing above, the position in English law seems to be much closer to the position in the South African law of contract. Not only has South African contract law received some of the abovementioned doctrines from the English common law, but there also seems to be a similar ideological resistance, especially on the part of the judiciary, to engage with equality in exchange as a ground for relief.

However, the idea of a general doctrine of unconscionability still enjoys some support; indeed such doctrines are present today in other common law jurisdictions such as Australia, Canada, and the United States.[274] Such a general doctrine might

[267] (1975) QB 326.
[268] See Beale et al *Contract Law* 593.
[269] (1975) QB 326 339.
[270] 336-337.
[271] (1980) AC 614 634.
[272] (1985) AC 686 708.
[273] See McKendrick *Contract Law* 303.
[274] Beale et al *Contract Law* 593-594; for a discussion of a similar development in the South African context see also S van der Merwe & LF van Huyssteen "Improperly Obtained Consensus" (1987) 50 *THRHR* 78.

present an attractive alternative to the piecemeal approach followed in the English common law.

3 7 The model rules or international contractual regimes

International contractual regimes, legal instruments, and model rules deal with equality in exchange in a variety of ways. In this study, the focus will be on two pertinent examples, namely Article 4:109 of the Principles of European Contract Law ("PECL")[275] and Article 3.2.7 of the UNIDROIT Principles of International Commercial Contracts ("PICC").[276]

3 7 1 Introduction to equality in exchange in the PECL, DCFR, and PICC

The PECL are of particular interest because they can be regarded as an attempt to formulate general principles of European contract law,[277] and thus represent modern thinking on the traditions that have shaped South African contract law. The PECL determine in Article 4:109, under the heading "Excessive benefit or unfair advantage" that:

> "(1) A party may avoid a contract if, at the time of the conclusion of the contract:
> (a) it was dependent on or had a relationship of trust with the other party, was in economic distress or had urgent needs, was improvident, ignorant, inexperienced or lacking in bargaining skill, and
> (b) the other party knew or ought to have known of this and, given the circumstances and purpose of the contract, took advantage of the first party's situation in a way which was grossly unfair or took an excessive benefit."

Art II - 7:207 of the Draft Common Frame of Reference ("DCFR") is identical to Article 4:109 PECL.[278] The DCFR Study Group took up the role as the successor to the PECL study group by drafting model rules for adjacent areas of law not covered by the PECL.[279] As a whole, the DCFR is similar in style and substance to the PECL,[280] and with regards to the provisions in question it does not add much except for some additional remarks and minor changes in the notes. It is therefore not necessary to discuss the DCFR separately from the PECL in this study.

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[275] See O Lando & H Beale (eds) *Principles of European Contract Law* Parts I & II (2000).
[276] See UNIDROIT (ed) *UNIDROIT Principles of International Commercial Contracts 2016* 4 ed (2017).
[277] R Zimmermann "Comparative Law and the Europeanization of Private Law" in M Reimann & R Zimmermann (eds) *The Oxford Handbook of Comparative Law* (2008) 539 563.
[278] See C von Bar & E Clive (eds) *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)* vol 2 (2009).
[279] Zimmermann "Europeanization of Private Law" in *Oxford Comparative Law* 569.
[280] 569.

Article 3.2.7 of the PICC determines that:

> "(1) A party may avoid the contract or an individual term of it if, at the time of the conclusion of the contract, the contract or term unjustifiably gave the other party an excessive advantage. Regard is to be had, among other factors, to:
> (a) the fact that the other party has taken unfair advantage of the first party's dependence, economic distress or urgent needs, or of its improvidence, ignorance, inexperience or lack of bargaining skill, and
> (b) the nature and purpose of the contract."

The nature of the PICC differs in two important aspects from the PECL and the DCFR. Firstly the PICC are aimed at a global, as opposed to a European harmonisation of private law, and secondly the PICC deal specifically with international commercial contracts, while the PECL deal with general contract law.[281] While it might seem strange to some that parties to a commercial contract are protected in this matter, there is in principle no reason why parties to commercial contracts cannot also be disadvantaged in an unjustifiable manner,[282] and they are therefore no less worthy of protection in these cases.

3 7 2 Functioning of the respective provisions

Both of these instruments take into account not only the objective discrepancy in the value of the respective performances, but also require, or at least give regard to, some element of procedural unfairness. The interaction between these two elements of objective disparity on the one hand, and procedural unfairness on the other, is briefly discussed below.

3 7 2 1 Calculating disproportion: A flexible approach

In contrast to the doctrine of *laesio enormis*, neither Article 3.2.7 PICC nor 4:109 PECL make use of a set mathematical ratio or threshold by which excessive advantage can be determined.[283]

The comments to Article 4:109 PECL state that "grossly unfair advantage" does not only relate to disparity in terms of value, but also to other cases of unfairness,[284]

[281] 567.
[282] JE du Plessis "Grounds for Avoidance" in S Vogenauer (ed) *Commentary on the UNIDROIT Principles of International Commercial Contracts* 2 ed (2015) 511.
[283] See Du Plessis "Grounds for Avoidance" in *Commentary on PICC* 514.
[284] Art 3.2.7. PICC, Comment 1; see also Art 4:109 PECL Illustration 5; Du Plessis "Grounds for Avoidance" in *Commentary on PICC* 512-513.

such as for example a contract that is good value for money, but which the prejudiced party can ill afford. Excessive advantage in terms of Article 4:109 PECL is determined in relation the "normal price" or other return typical in such contracts. Comment D of the official comments to this provision also stresses that a shortage of supply leading to generally high prices, and abnormally high profits, would not be ground for its application.

Art 3.2.7 PICC differs from 4:109 PECL in the respect that the former sets excessive advantage as a minimum requirement;[285] whereas under 4:109 PECL the remedy is available both where advantage was taken in a manner that is grossly unfair, or where excessive benefit was taken.

The "excessive advantage", which Article 3.2.7 PICC states as a minimum requirement, relates only to the substance of the contract.[286] This requirement is considered to be rather onerous. Even a considerable disparity in the performance and counter performance would be insufficient for the contract to be avoided or adapted.[287] What is required is disequilibrium between the respective obligations of the parties that is so great as "to shock the conscience of a reasonable person".[288]

3 7 2 2 When is advantage-taking unjustified?

The comments to Article 4:109 PECL make clear that an excessive advantage on its own will not be enough in most cases for the contract to be set aside. It would ostensibly create too much uncertainty if contracts were voidable solely due to objective disparity, especially in cases where it is not clear why the disadvantaged party was not able to look after their own interests.[289]

Article 3.2.7 PICC requires in a comparable fashion that the taking of the excessive advantage should be unjustifiable.[290] From this construction it is clear that there will be instances where giving an excessive advantage can be justified.

[285] Du Plessis "Grounds for Avoidance" in *Commentary on PICC* 512.
[286] 513.
[287] Art 3.2.7. PICC, Comment 1.
[288] Comment 1.
[289] Art 4:109(3) PECL, Comment B.
[290] See Art 3.2.7. PICC, Comment 2.

The provision states that in adjudging whether an excessive advantage has been given in an unjustifiable manner, regard must be had to all the circumstances; therefore no closed list of factors which can be considered exists.[291] The two factors which are included in the text of the article, and which deserve special attention according to the notes, are certain forms of taking advantage of an (unequal) bargaining position between the parties (Article 3.2.7(1)(a), and the nature and purpose of the contract (Article 3.2.7(1)(b)).

The comments use "unequal bargaining position" as a catch-all term for taking unfair advantage of the other party's dependence, economic distress or urgent needs, or its improvidence, ignorance, inexperience, or lack of bargaining skill.[292] Support has been expressed for referring to these factors as "taking advantage of certain forms of weakness",[293] which might be a more appropriate term.[294]

Similar to Article 4:109 PECL, a superior bargaining position brought about by market forces would not in and of itself be enough to satisfy this requirement in Article 3.2.7 PICC,[295] nor would this requirement be satisfied in the case of an ignorant party who could otherwise reasonably have been expected to know the state of affairs.[296]

The comments to Article 3.2.7(1)(b), on the nature and purpose of the contract, are rather vague, and might be seen by some as leaving too much room for discretion. The comments state that depending on the nature and the purpose of the contract, an excessive advantage can be unjustifiable even where the benefitting party did not abuse the other party's weak bargaining position.[297] Beale et al, are of the opinion that the above-mentioned comment indicates that this provision differs

[291] See Art 3.2.7. PICC, Comment 2; Du Plessis "Grounds for Avoidance" in *Commentary on PICC* 514.
[292] See Art 3.2.7. PICC, Comment 2(a).
[293] Du Plessis "Grounds for Avoidance" in *Commentary on PICC* 514.
[294] For example there might be situations where the party who would usually be considered to be in the stronger bargaining position is in fact the disadvantaged party.
[295] Du Plessis "Grounds for Avoidance" in *Commentary on PICC* 515.
[296] 515.
[297] Art 3.2.7. PICC, Comment 2(b).

from Article 4:109 PECL, in that under Article 3.2.7 PICC an "unjustifiably excessive advantage" may in and of itself be enough to render a contract voidable.[298]

3 7 2 3 Is actual or deemed knowledge of the abuse a requirement for relief?

The knowledge requirement in Article 4:109(b) PECL is satisfied where the stronger party knew or ought to have known that the disadvantaged party was not in a position to protect his own interests, and nevertheless proceeded to take advantage.[299] This raises the question under what circumstances an advantaged party "ought to have known" about the circumstances of weakness. The comments only state in this regard that it would create too much uncertainty if contracts are set aside where there was no reason for the advantaged party to know about the situation of weakness of the disadvantaged party.[300]

Contrary to Article 4:109 PECL, Article 3.2.7 PICC does not expressly require that the advantaged party knew or ought to have known of the weakness when taking advantage thereof.[301] As the factors to be taken into account are not a closed list, the knowledge of the advantaged party could still play a role as part of the consideration of the general circumstances of the case.

3 7 3 Effect of the remedy

Both Article 3.2.7 PICC and Article 4:109 PICC allow for a contract to be avoided or adapted at the request of the disadvantaged party.[302] This might be seen as acknowledgement thereof that a number of cases exist where the disadvantaged party would not want the contract to be invalidated, but would prefer that the contract continues in a modified form.[303] This could for example be due to some commercial necessity, or due to the time and expenses involved in concluding a new agreement. In adapting the contract, the PECL and PICC follow relatively similar approaches, adapting the contract to what might have been agreed had the requirements of good

[298] Beale et al *Contract Law* 570. Note that although Beale et al refer to the older version of the UNIDROIT principles, nothing has changed in the substance of the article in question.
[299] Art 4:109(3) PECL, Comment C.
[300] Comment C
[301] Du Plessis "Grounds for Avoidance" in *Commentary on PICC* 515.
[302] Art 4:109(3) PECL; Art 3.2.7(1) & (2) PICC.
[303] Art 4:109 PECL, Comment G.

faith and fair dealing been met under PECL,[304] or making the contract accord with reasonable commercial standards of fair dealing under the PICC.[305]

The same could be said with regards to the party that received an excessive advantage, in that invalidating the contract could also result in unfairness to them, or at least a suboptimal arrangement. Accordingly, both Article 4:109(3) PECL and Article 3.2.7(3) PICC grant the court the ability to adapt the contract at the request of the party receiving notice of avoidance (the advantaged party); provided that they inform the party who gave notice of avoidance promptly and before they act on said avoidance.

Under Article 4:117 PECL the disadvantaged party may in addition to, or instead of, avoidance of the contract, recover damages to the extent of the position they were in before the conclusion of the contract.[306] Article 3.2.16 PICC determines that a party is liable for damages if they knew or ought to have known of a ground for avoidance, and that this right arises irrespective of whether the contract is avoided. After avoidance in terms of Article 3.2.7 PICC the respective obligations terminate retroactively and mutual duties of restitution arise.[307] A party who chooses to adapt the contract loses their right to avoidance under both PECL and the PICC. Neither of these remedies can be excluded by agreement by the parties or otherwise.[308]

3 7 4 Conclusion

The model rules studied above present modern and flexible manifestations of a fair price rule. Both of these rules take into account not only the objective disparity between the value of the respective performances, but also the conditions under which the contract was concluded, in assessing its fairness. The model rules are also flexible in their approach to restitution, allowing for adaptation of the contract both on request of the advantaged and disadvantaged parties, as well as allowing for the recovery of damages on the part of the disadvantaged party.

[304] Art 4:109 PECL.
[305] Art 3.2.7 PICC.
[306] Art 4:109 PECL, Comment G.
[307] Du Plessis “Grounds for Avoidance” in *Commentary on PICC* 517.
[308] See Art 4:118 (1) PECL and Art 3.1.4 PICC.

3 7 5 Fair price rules in European consumer contract law

The discussion of the international model rules has focused on the position in general contract law in relation to the PECL, and international commercial contract law in relation to the PICC. Some commentators have noted that the European trend in relation to fair price rules seems to be in favour of rules that go beyond merely looking at objective disparity, and instead take account of the circumstances under which the contract has been concluded, i.e. if there has been some procedural defect in the conclusion of the contract.[309]

The position seems to be somewhat different in the field of European consumer contract law, where there appears to be a greater willingness to engage in price control based predominately on objective disparity in the value of the respective performances. Two examples might be used to substantiate this proposition: The first relates to the European Court of Justice's interpretation of the Unfair Contract Terms Directive of 1993,[310] which appears to have, in outcome if not in theory, created a fair price rule based predominantly on objective disparity.[311] The second example relates to the amendments of the European Parliament to the European Commission's proposal for a Common European Sales Law ("CESL"), which has had the effect of creating a fair price rule based only on objective disparity.[312]

3 7 5 1 The Unfair Contract Terms Directive: The exclusion of price from fairness control

Article 3(1) of the Unfair Contract Terms Directive allows for the invalidation of non-individually negotiated contract terms that result in a significant imbalance in the rights and obligations of the respective parties.[313] However, Article 4(2) of the same directive exempts the definition of the main subject matter (of the contract), as well as the adequacy of price, from the unfairness test, insofar as these terms are in plain

[309] See for example H Eidenmüller "Justifying Fair Price Rules in Contract Law" (2015) 11 *ERCL* 220 221.
[310] Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts.
[311] This is discussed immediately below at 3 7 5 1.
[312] Discussed below at 3 7 5 2.
[313] Art 3(1): "A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer."

intelligible language.[314] These exemptions were not present in the first draft of the Directive, but instead were introduced after some writers commented that if control were extended to individually negotiated terms, as well as the core terms such as the price, it would be detrimental to both party autonomy and the functioning of the free-market economy.[315]

Many EU member states chose not to include these exemptions when transposing the Directive into national law meaning that price terms can be reviewed for fairness in these jurisdictions.[316] More recently the European Court of Justice ("ECJ") has laid down very strict requirements for terms to be considered "in plain intelligible language". The ECJ[317] found in 2014 a dispute relating to the loan agreements denominated in foreign currencies, that "plain intelligible language" should be purposively interpreted so as to require not only that a term is grammatically intelligible to the consumer, but also that it is set out in a transparent fashion so that the consumer is "in a position to evaluate, on the basis of clear, intelligible criteria, the economic consequences" which derive from the term. The ECJ in reaching this conclusion placed emphasis on the position of weakness which the consumer typically finds himself in, relating to both his reduced bargaining power and level of knowledge, *vis-à-vis* the seller.[318] According to the court position of weakness necessitates that a broader interpretation of the transparency requirements should be taken so as to satisfy the purpose of the directive in question, to protect the consumer.[319]

This approach, which requires not only that the contract terms in question are merely formally and grammatically intelligible to the average consumer, but rather that the consumer is able to evaluate the economic consequences which derive from

[314] Art 4(2): Assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplies in exchange, on the other, in so far as these terms are in plain intelligible language.
[315] See M Dellacasa "Judicial Review of 'Core Terms' in Consumer Contracts: Defining the Limits" (2015) 11 *ERCL* 152 159; see also the original comments mentioned above: HE Brandner & P Ulmer "The Community Directive on Unfair Terms in Consumer Contracts: Some Critical Remarks on the Proposal Submitted by the EC Commission" (1991) 28 *Common Market LR* 647 652, 656.
[316] See H Schulte-Nölke, C Twigg-Fleshner, & M Ebers (eds) *EU Consumer Law Compendium* (2008) 226 who state that fifteen countries adopted the exclusion, while ten did not.
[317] ECJ, 30.04.2014 - C-26/13, *Árpád Kásler, Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt* paras 70-75; see also See Dellacasa (2015) *ERCL* 152.
[318] See paras 39-40.
[319] See paras 72, 39; see also Dellacasa (2015) 11 *ERCL* 157.

the term, was very recently confirmed in another similar dispute before the ECJ.[320] In the case in question the court seemed to set even more onerous requirements for terms to be considered transparent.[321]

These judgments are still relatively recent, and it is therefore difficult to say what their effect will be. However, if this approach were followed in future, it could lead to all but the clearest terms, including price terms, becoming reviewable for fairness under the Directive. This would have the effect that all non-individually negotiated (standard term) contracts that result in a significant imbalance in the value of the respective performances could theoretically be set aside by the court.

3 7 5 2 The fair price rule in the CESL

The CESL initially contained a substantially similar exclusion of price terms from fairness control to that discussed above in relation to the Unfair Contract Terms Directive.[322] However, the European Parliament in its first reading of the proposal adopted two amendments that in effect removed these exclusions and extended fairness control to the adequacy of price.[323] The justification given in the report for these amendments indicated that it was the express intention of the European Parliament that fairness control should be extended to core terms (i.e. price), and was billed as a far reaching improvement for consumer protection.[324] The amended unfairness test would require only that there be a significant imbalance in the rights and obligations of the parties, and that the imbalance was contrary to good faith and fair dealing, for the contract to be set aside.[325]

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[320] ECJ, 20.09.2017 - C-186/16, *Ruxandra Paula Andriciuc v Banca Românească SA*.
[321] See especially paras 44-51.
[322] See arts 80 and 83 of the CESL; see also M Hesselink "Unfair Prices in the Common European Sales Law" in L Gullifer & S Vogenauer (eds) *English and European Perspectives on Contract and Commercial Law* (2014) 225 227.
[323] See Hesselink (2015) *ERCL* 187; see also *Report on the Proposal for a Regulation of the European Parliament and of The Council on a Common European Sales Law (COM(2011)0635 – C7-0329/2011 – 2011/0284(COD))* Amendments 153 and 155 ("CESL Report"). Available online at: http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2013-0301&language=EN
[324] See CESL Report (n 323) Amendment 153 Justification.
[325] The amended provision determined that: "(1). In a contract between a trader and a consumer, a contract term supplied by the trader is unfair for the purposes of this Section if it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer, contrary to good faith and fair dealing."

Although the CESL proposal was ultimately withdrawn, it should serve as some evidence, together with that of the developments discussed above in relation to the Unfair Contract Terms Directive, that there appears to be an increased willingness in European consumer law to engage in price control based predominantly on objective disparity. However, it remains to be seen whether the adoption of these amendments indicate a lasting change in the approach to the regulation of fairness in consumer contracts.

3 8 Conclusion

This chapter studied four national regimes in addition to a number of international model rules. These four national regimes represent four different ways of dealing with the issue of equality in exchange. Two of these systems, namely Louisiana and Austria, make use of fair price rules based almost exclusively on objective disparity in the value of performances. There are however important differences between these two versions of the doctrine of *laesio enormis*. While the doctrine of lesion beyond moiety in Louisiana is largely unchanged from the law as it was received from France at the turn of the 19th century,[326] its counterpart in Austria has been adapted and modified to bring it into step with the modern commercial realities. The scope of application of § 934 ABGB is not restricted as in Louisiana, to any particular type of contract, and courts in Austria have taken a pragmatic approach allowing the remedy to be applied where the contract itself contains an element of chance.

The current legal position in Austria goes the furthest to show that even a relatively traditional fair price rule is not incompatible with modern contract law. The contrast between these two systems should also serve to indicate that there is no one "doctrine of *laesio enormis*", but rather a variety of fair price rules, which although all descended from the *Lex Secunda*, can function in quite divergent ways.

The remedy in Germany, which relies on § 138 BGB, can be called a fair price rule, but functions somewhat differently to the doctrine of *laesio enormis*, which was abolished in most of Germany during the 19th century. Importantly for the purposes of this study, the rule relies on a discrepancy in the value of performance of the respective parties, which however needs to be combined with the intentional or

[326] Odinet (2015) *Louisiana LR* 775.

negligent exploitation of some form of weakness. As this study has pointed out above, the position has changed through the interpretation of open-ended norms to such an extent that German law is moving closer to the position where gross discrepancy is by itself enough to invalidate a contract.[327] Through it might not have been the intention of the drafters of the BGB; Germany seems to have, in practice at least, a modern and useful fair price rule.

Similar to the example in Germany, the international model rules studied, namely the PECL and PICC, employ fair price rules which take into account both objective disparity in the value of performances, and the conditions under which the contract were concluded. The model rules are wide in their scope of application, and flexible in their approach to determining whether the price is fair, and their approach to restitution; both of these aspects are arguably necessary for a modern fair price rule.

It has also been noted that the strict transparency requirements of the ECJ under the Unfair Contract Terms Directive have in effect created a fair price rule in European consumer contract law. The amendments to the CESL which intentionally extended fairness control to price are similarly interesting in that both of these developments seem to indicate an increased willingness to engage in price control.

Finally, it has been noted that no overarching doctrine or rule exists in England which can be called a fair price rule. It rather recognises a patchwork of different approaches, each of which has the effect of granting protection to the weaker party in a harsh bargain in specific circumstances.[328] In this light the idea was discussed that a general doctrine of unconscionability might well be desirable, so as to provide a theoretical basis for what is already in effect happening in practice, and also to unify these disparate approaches and thereby increase legal certainty.

Now that the comparative and historical overview is complete, the next chapter will examine whether such a fair price rule would in fact be a desirable development in South African law of contract. It will do so by testing the fair price rule against some fundamental values of contract law in an attempt to ascertain whether a fair price rule would be beneficial, and if so, at what cost it could come.

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[327] See 3 3 6 above.
[328] See Kötz *Contract Law* 113.

CHAPTER 4: AN EVALUATION OF FAIR PRICE RULES

4 1 Introduction

The previous two chapters focused on the historical development of the doctrine of *laesio enormis*, and the functioning of a variety of modern fair price rules. While this has provided some insight into the doctrinal development and application of these legal rules, less attention was paid to the more normative question of whether a fair price rule is at all desirable, measured against the values and principles important to South African contract law.

In a judgment strongly critical of the doctrine of *laesio enormis*, Van den Heever JA stated in *Tjollo Ateljees (Eins) Bpk v Small*,[1] ("*Tjollo Ateljees"*) that the doctrine is not in harmony with either immanent reason or public policy, as it entails that a contracting party whose judgement is "in no way impaired or restricted, seeks relief not against a wrong, but against his own lack of judgment, ineptitude or folly." To what extent is this statement still true of modern fair price rules? The arguments of the judges in *Tjollo Ateljees* appear to have been persuasive, as the legislature subsequently decided to abolish the doctrine.[2] However, as was shown in the previous two chapters, there is no single doctrine of *laesio enormis*, but rather a variety of fair price rules which in practice fulfil a similar function, often in very different ways.

This chapter seeks to take a broader view by attempting to evaluate the desirability of fair price rules in general, with reference to certain fundamental values of contract law, namely, dignity and autonomy, economic efficiency, and legal certainty. These values were chosen because of their prominence in debates on fair price rules in historical and contemporary literature, as well as their importance in contemporary South African contract law.

However, this chapter will take no particular stance regarding which of the fair price rules studied in the previous chapter (if any) is the most desirable, as this choice pre-empts the discussion in chapter 5 which studies the functioning of fair

[1] 1949 1 SA 856 (A) 871.
[2] See s 25 of the General Law Amendment Act 32 of 1952; HR Hahlo & E Kahn "Two Important Changes in the Common Law" (1952) 69 *SALJ* 392.

price rules. The discussion in this chapter therefore relates to the more abstract question of whether fundamental values of contract law would support the adoption of a fair price rule, i.e. a rule which allows courts to set aside a contract based primarily on the discrepancy in the value of the respective performances.

Debate and academic writing regarding the desirability of a fair price rule is relatively limited in South African literature; this is in all likelihood due to the abolition of the doctrine of *laesio enormis*, and the quiet existence which section 48(1)(a)(i) of the CPA has enjoyed thus far.[3] By contrast, the topic of fairness of price has enjoyed considerable attention internationally. In addition to an abundance of academic writing on the topic in legal systems with fair price rules (such as Germany, Austria, France, and Louisiana) the process of harmonisation of European contract law has provided fertile ground for academic writing on the topic.[4] Limited writing also exists in the common law on the topic of fairness in price, especially in relation to autonomy and economic efficiency.[5]

4 2 Dignity and autonomy

While it might seem at first to be rather unorthodox, this section deals with both dignity and autonomy under the same heading. The discussions of these two values overlap to a significant extent in academic literature and arguments regarding fairness of price. The argument is twofold, and the following distinction is central to it. On the one hand a fair price rule can function as a mechanism that combats exploitation and procedural unfairness, thereby protecting the autonomy of contracting parties, which is said to promote an empowerment conception of dignity.[6] On the other hand, a fair price rule that seeks a measure of equivalence between the parties' respective performances promotes parties having a measure of regard for

[3] On s 48 of the CPA see the discussion below at 6 3, as well as T Naudé "Section 48" in T Naudé & S Eiselen (eds) *Commentary on the Consumer Protection Act* (RS 2 2017) para 8; J Barnard "Unfairness of Price and the Doctrine of *Laesio Enormis* in Consumer Sales" (2013) 76 *THRHR* 521.
[4] See most prominently H Eidenmüller "Justifying Fair Price Rules in Contract Law" (2015) 11 *ERCL* 220 221; MW Hesselink "Could a Fair Price Rule or its Absence be Unjust?" (2015) 11 *ERCL* 185; MW Hesselink "Unfair Prices in the Common European Sales Law" in L Gullifer & S Vogenauer (eds) *English and European Perspectives on Contract and Commercial Law* (2014) 224; T Gutmann "Some Preliminary Remarks on a Liberal Theory of Contract" (2013) 76 *Law and Contemporary Problems* 39.
[5] See for example SA Smith "In Defence of Substantive Unfairness" (1996) 112 *LQR* 138; P Benson "The Unity of Contract Law" in P Benson (ed) *The Theory of Contract Law* (2001) 184 184-195; FH Buckley "Three Theories of Substantive Fairness" (1990) 19 *Hofstra LR* 33.
[6] See 4 2 6 below.

each other's interests and ends, thereby promoting the conception of dignity as a "constraint", a notion on which the chapter will expand presently.[7] Suffice it to say that this notion also ties in with the idea that good faith and *Ubuntu* are underlying values in the South African law of contract, which need to find expression in concrete rules.

4 2 1 Defining dignity

Defining dignity is notoriously difficult. A large variety of different uses of the term emerge in historic and current practice,[8] and many writers seem to avoid going further than regarding it as a value that demands respect for a person.[9] Indeed one of the points of criticism that is levelled most often against the use of dignity, especially as a justiciable right, is that the term is vague or devoid of real meaning,[10] or that it means nothing more than respect for persons or their autonomy.[11] A further source of criticism is that it seems to be inspired by religious or metaphysical ideas from which it cannot be separated.[12]

While the many different conceptions of dignity need to be acknowledged, it is not necessary, or indeed possible for purposes of this study, to engage in this debate. It will be assumed that there is at least some core meaning of the concept, which demands the recognition that all human beings possess some intrinsic value that cannot be violated.[13] Furthermore, the focus will especially be on the above-mentioned two different conceptions of dignity that are prevalent in the literature,

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[7] See 4 2 5 and 4 2 7 below.
[8] For an overview of the different senses in which the term is used see: C McCrudden "In Pursuit of Human Dignity: An Introduction to Current Debates" in C McCrudden (ed) *Understanding Human Dignity* (2013) 1 8-10.
[9] 11.
[10] See for example M Rosen "Dignity the Case against" in *Understanding Human Dignity* 143 143-145, 149-150; LR Kass "Defending Human Dignity" in The President's Council on Bioethics (eds) *Human Dignity and Bioethics: Essays Commissioned by the President's Council on Bioethics* (2008) 297, 306. SM Shell "Kant's Concept of Human Dignity as a Resource for Bioethics" in *Human Dignity and Bioethics* 330.
[11] See R Macklin "Dignity is a useless concept" (2003) *British Medical Journal* 1419-1420.
[12] See Macklin (2003) *British Medical Journal* 1420, Kass "Defending Human Dignity" in *Human Dignity and Bioethics* 298; see contra: TE Hill "In Defence of Human Dignity: Comments on Kant and Rosen" in *Understanding Human Dignity* 313 324-325.
[13] See for example M Nussbaum "Human Dignity and Political Entitlements" *Human Dignity and Bioethics* 351 352; H Botha "Human Dignity in Comparative Perspective" (2009) 20 *Stell LR* 171 217; see also Hill "In Defence of Human Dignity" in *Understanding Human Dignity* 315-317 on the unification of diverse ideas of dignity.

namely dignity as empowering value, and dignity as constraint.[14] Both of these conceptions of dignity are ultimately based on a Kantian understanding of dignity.[15] While it is seldom explicitly stated by the Constitutional Court, it is clear from a number of its judgments that it also follows a Kantian understanding of dignity.[16] Before these two conceptions of dignity and how they relate to a fair price rule is discussed, it may be instructive to engage in a brief discussion of the conceptual underpinnings of Kantian dignity, as well as the role of dignity in the South African constitutional dispensation.

Closely related to a Kantian understanding of dignity, is the ideal of personal autonomy, i.e. the notion that individuals should be authors of their own lives,[17] and that they should accordingly be granted the freedom and self-determination necessary to pursue their own ends.[18] The link between these understandings of autonomy and dignity will be discussed in more detail below.[19]

4 2 2 The role of dignity in the South African constitutional framework

Human dignity is recognised by the Constitution of the Republic of South Africa, 1996 ("Constitution") as both a foundational value of South African society that informs the interpretation of all other rights, and a discrete right in the Bill of Rights.[20] Section 10 of the Constitution states that: "Everyone has inherent dignity and the right to have their dignity respected." The right to dignity, though not absolute, is non-derogable along with the right to life, even in states of emergency. Section 7(1) also states that the Bill of Rights is a cornerstone of South African democracy, and affirms the democratic values of human dignity, equality and freedom. The limitation of rights

[14] See for example R Brownsword "Freedom of Contract, Human Rights and Human Dignity" in D Friedmann & D Barak-Erez (eds) *Human Rights in Private Law* (2001) 181 183; D Bhana & M Pieterse "Towards a Reconciliation of Contract Law and Constitutional Values: Brisley and Afrox Revisited" (2005) 122 *SALJ* 865 880, 881; D Bhana "The Development of a Basic Approach for the Constitutionalisation of our Common Law of Contract" (2015) 26 *Stell LR* 3 17; GF Lubbe "Taking Fundamental Rights Seriously" (2004) 121 *SALJ* 395 421.
[15] Brownsword "Freedom of Contract" in *Human Rights* 191.
[16] See below at 4 2 4; S Cowan "Can Dignity Guide South Africa's Equality Jurisprudence" (2001) 17 *SAJHR* 34 54; L Ackermann *Human Dignity: Lodestar for Equality in South Africa* (2012) 99; Botha (2009) *Stell LR* 207; HM Du Plessis *The Harmonisation of Good Faith and Ubuntu in the South African Common Law of Contract LLD Thesis*, University of South Africa (2017) 274-276.
[17] See prominently J Raz *The Morality of Freedom* (1986) 370-372.
[18] See GF Lubbe & CM Murray *Contract: Cases, Materials and Commentary* 3 ed (1988) 20, 21.
[19] See 4 2 3-4 2 5.
[20] Sections 1, 7, and 10 of the Constitution; see E Cameron "Dignity and Disgrace: Moral Citizenship and Constitutional Protection" in *Understanding Human Dignity* 467 474.

in terms of section 36 can furthermore only occur to the extent that it is reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom.

The Constitutional Court recognised in *S v Makwanyane*[21] (henceforth *Makwanyane*) that dignity and the right to life are the most important rights, and form the source or foundation for all other personal rights. Dignity also functions as a residual right that is used to interpret and give shape to other rights, and is applied where more specific rights do not find application.[22] Dignity is therefore sometimes referred to as supreme value, and as an interpretative *Leitmotiv* of the Constitution as a whole.[23]

4 2 3 Kantian dignity

It has been noted by a number of academic commentators that the Constitutional Court often makes use of the Kantian "object formulation" in its dignity jurisprudence.[24] The object formulation of dignity is derived from the Kantian categorical imperative[25] that we should act in such a manner that we treat humanity, both in our own person and in others, as an end in itself, and never merely as a means.[26] According to Kant, human beings are bearers of dignity because of our capacity as individuals to choose our own ends, and the rational means by which we pursue those ends.[27] Our rational agency therefore constitutes an important part of what distinguishes us from objects. Therefore, when we treat other persons merely as ends, we deny them the capacity to shape themselves and their environment, in effect reducing them to nothing more than objects.[28]

In the view of Kant, everything has either a price (*Preis[s]*), or it has dignity (*Würde*). Those things which serve to satisfy human needs and inclinations have a

[21] *S v Makwanyane* 1995 3 SA 391 (CC) paras 144 and 328.
[22] See Botha (2009) *Stell LR* 198.
[23] Botha (2009) *Stell LR* 197.
[24] This is discussed below at 4 2 4.
[25] A categorical imperative can be understood in simple terms as a rule which must be observed in all circumstances, no matter what the objective; see M Rohlf "Immanuel Kant" in EN Zalta (ed) *The Stanford Encyclopedia of Philosophy* (Spring 2016 ed) 5.4.
[26] On the Kantian object formulation see Botha (2009) *Stell LR* 183-186; Ackermann *Human Dignity* 54-58.
[27] See M Cholbi *Understanding Kant's Ethics* (2016) 40, 110.
[28] Botha (2009) *Stell LR* 183.

price; their value is relative, and they can be exchanged for other things. That which Kant considers to be elevated above any price, and is therefore absolute, has dignity.[29] As the bearers of dignity, humans enjoy a special status.[30]

Selling a human into slavery, for example, violates a person's dignity, as it places a limitation on the ability of an individual to control their own lives, and therefore restricts the scope of their agency.[31] In the same vein Kant argues that a false promisor, for example someone who borrows money from another with no intention of paying it back, violates their duty to respect the dignity of others, as the ends of the lender play no role in the decision of the false promisor (in choosing to misrepresent their intention to repay the loan). By doing so the false promisor treats the capacity for choice of the lender not as worthy of respect, but as a simple tool or instrument.[32]

4 2 4 The Kantian object formulation in the Constitutional Court

While the Constitutional Court does not explicitly refer to the object formulation, it is clear from a number of judgments that it understands dignity in Kantian terms.[33] This is illustrated best in *Makwanyane* where the Constitutional Court struck down the death penalty on the basis that it reduced the convicted person to an object to be eliminated by the state,[34] objectifying them as a tool for crime control,[35] or treating them as objects to be toyed with.[36] Especially in the context of judicial sentencing, courts have reiterated this position that the accused should not be treated simply as an object.[37]

In *Coetzee v Comitis*[38] the court found similarly that the rules of the National Soccer League, in terms of which players were transferred between teams, stripped players of their dignity as they were treated like objects, no different from a motor

[29] Cholbi *Kant's Ethics* 112; see I Kant, J Timmermann (ed) & M Gregor (transl) *Groundwork of the Metaphysics of Morals: A German–English Edition* (2011) 96-99.
[30] Cholbi *Kant's Ethics* 113.
[31] 112.
[32] 46.
[33] See the discussion in Ackermann *Human Dignity* 99-102.
[34] Para 26 per Chaskalson CJ.
[35] Para 316 per Mokgoro J.
[36] Brennan J in *Furman v Georgia* 408 US 238 at 272-3 (1972); cited with approval by O'Regan J in para 328 of *Makwanyane*; see also Ackermann *Human Dignity* 100.
[37] See Botha (2009) *Stell LR* 202.
[38] 2001 1 SA 1254 (C).

vehicle. In *MEC for Education: Kwazulu-Natal v Pillay*[39] the court also stated in the context of religious expression that a necessary element of freedom and dignity is that an individual is entitled to respect for the unique set of ends which he chooses to pursue. The conception of dignity discussed above can therefore be said to entail respecting the ends of others, and refraining from reducing them to objects.

4 2 5 Two conceptions of dignity in contract law

As indicated earlier, two separate conceptions, or dimensions of dignity are especially prominent in literature on the role of dignity in contract law: dignity as an empowering value that gives expression to the autonomy of contracting parties, and dignity as a constraint, that places a check on the "obscene excesses" of autonomy by requiring that contracting parties have a measure of regard for the interest of their contracting partners.[40]

The conception of dignity as an empowering value is often said to support individual freedom and a classical liberal theory of contract law, based predominantly on values such as consent, freedom of contract, and the binding force of contracts.[41] The first part of this section will deal with the manner in which a fair price rule can promote this dimension or conception of dignity through protecting the autonomy of contracting parties. The second part of the chapter in turn will discuss the second conception or dimension of dignity, that of dignity as a constraint. The argument here is that if every human being possesses a certain inherent worth that is inviolable, and if the state takes a particular view about what it means to live a dignified life, then a state that is committed to the protection of dignity should introduce restrictions to the freedom which people have to make choices that interfere with their dignity, the dignity of others, or the dignity of the human race as a whole.[42] The question is then whether a fair price rule can act as such a restriction.

[39] 2008 1 SA 474 (CC) para 64.
[40] This distinction emerged first in D Feldman "Human Dignity as a Legal Value: Part 1" (1999) *Public Law* 682 685; see also Du Plessis *Good Faith and Ubuntu* 215.
[41] See Lubbe (2004) *SALJ* 421, Bhana (2015) *Stell LR* 17; see also D Bhana *Constitutionalising Contract Law* PhD Thesis, University of the Witwatersrand (2013) 5, 71; Du Plessis *Good Faith and Ubuntu* 282-283.
[42] See Feldman (1999) *Public Law* 685.

4 2 6 The empowerment conception of dignity

4 2 6 1 Introduction

The empowerment-based conception of dignity grounds it in the rational agency which humans possess.[43] It places emphasis on the capacity of individuals to make decisions about their own lives, to choose the ends which they wish to pursue, and to contribute to decisions which affect them.[44] This conception of dignity is promoted through protecting the autonomous choices of individuals,[45] and is therefore described as being an autonomy-based conception of dignity.[46]

An empowerment conception of dignity is also said to support a so-called classical theory of contract law.[47] This theory of contract law demands that individuals should be allowed to enter into contracts on their own terms, with a minimum level of state interference, and that these terms should subsequently be enforced.[48] The autonomy of contracting parties, expressed through principles of the law of contract such as the will of the parties, consent, freedom of contract, and the binding force of contract, forms a theoretical cornerstone of the law of contract both locally,[49] and internationally.[50]

The understanding of dignity as an empowering value in South African contract law is most apparent in the judgment in *Brisley v Drotsky*[51] where the Supreme Court of Appeal emphasised the relationship between party autonomy and dignity by stating that:

> "The Constitutional values of dignity and equality and freedom require that the courts approach their task of striking down contracts or declining to enforce them with perceptive

[43] See Bhana & Pieterse (2005) *SALJ* 880, 881.
[44] Feldman (1999) *Public Law* 685.
[45] Bhana & Pieterse (2005) *SALJ* 881.
[46] Bhana *Constitutionalising Contract Law* 5.
[47] Lubbe (2004) *SALJ* 421; Du Plessis *Good Faith and Ubuntu* 220, 282-283.
[48] See Lubbe & Murray *Contract* 20, 21; LF van Huyssteen, MFB Reinecke, & GF Lubbe *Contract General Principles* 5 ed (2016) 22-23; see also E McKendrick *Contract Law* 11 ed (2015) 2-3.
[49] See Van Huyssteen et al *Contract* 10, 11, 22-23; see also Bhana (2015) *Stell LR* 4, 9-12.
[50] See for example; Article 1:102 PECL, Comment; Article 4:109 PECL, Comment A; Art.II.-1:102 DCFR; Art 1 CESL 1: Freedom of contract; (2015) *ERCL* 220 221; H Eidenmüller "Why Withdrawal Rights" (2011) *ERCL* 1 2; F Rödl "Contractual Freedom, Contractual Justice, and Contract Law (Theory)" (2013) 76 *Law and Contemporary Problems* 57 59; E McKendrick *Contract Law* 11 ed (2015) 2-3.
[51] 2002 4 SA 1 (SCA) para 94; the translation is from Lubbe (2004) *SALJ* 420.

> restraint … contractual autonomy is part of freedom. Shorn of its obscene excesses, contractual autonomy informs also the constitutional value of dignity."

In *Barkhuizen v Napier*,[52] the Constitutional Court noted in a similar manner that: "self-autonomy or the ability to regulate one's own affairs, even to one's detriment, is the very essence of freedom and a vital part of dignity." The minority judgment of Ackermann J in *Ferreira v Levin*[53] is similarly supportive of an autonomy-based approach to dignity. He argues that dignity without freedom is "little more than an abstraction", and that a wide scope for freedom is necessary for the full development of the humanity of individuals.

The empowerment-based conception of dignity also seems to align well with the traditional approach in the South African common law of contract. South African courts have attached great weight to the understanding of freedom of contract, encapsulated in the maxim *pacta sunt servanda*, that contracts entered into freely should be enforced.[54] Already in 1903 Innes CJ stated for example in *Burger v Central South African Railways*[55] that:

> "[O]ur law does not recognise the right of a court to release a contracting party from the consequences of an agreement duly entered into by him merely because that agreement appears to be unreasonable."

This might explain why Van den Heever JA found the doctrine of *laesio enormis* so offensive,[56] and lead him to assert in *Tjollo Ateljees*[57] in relation to the doctrine that:

> "In my opinion the doctrine that persons of full legal capacity can resile from a contract into which they have solemnly entered in the absence of fraud, duress or excusable mistake, was never part of the law of South Africa, and in the few cases in which it was applied, it was done so by mistake."

4 2 6 2 Fair price rules as a mechanism to protect party autonomy

The doctrine of *laesio enormis,* and indeed any fair price rule which allows contracting parties to escape a *prima facie* validly concluded contract, seems, at least

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[52] 2007 5 SA 323 (CC) para 57.
[53] *Ferreira v Levin NO and Vryenhoek v Powell NO* 1996 1 SA 984 (CC) para 49.
[54] See D Moseneke "Transformative Constitutionalism: Its Implications for the Law of Contract" (2009) 20 *Stell LR* 3 9; DD Tladi "Breathing Constitutional Values into the Law of Contract: Freedom of Contract and the Constitution" (2002) 35 *De Jure* 306 308.
[55] 1903 TS 571 576.
[56] Tladi (2002) *De Jure* 310 argues that Van den Heever JA refused to recognise the doctrine of *laesio enormis* as valid law primarily because it is in conflict with *pacta sunt servanda*.
[57] *Tjollo Ateljees (Eins) Bpk v Small* 1949 1 SA 856 (A) 871.

on a superficial basis, to be at odds with party autonomy and an autonomy-based conception of dignity. However, this position may be regarded as rather simplistic. While it is indeed the norm that contracting parties should be held accountable for their decisions, recognising the dignity and autonomy of contracting parties also demands that they should not be held responsible for actions or decisions that were not of their own free will.[58]

The doctrines of fraud, duress, and undue influence, or the rules regarding capacity to contract, are not viewed as exceptions to a law of contract based on party autonomy or the will of contracting parties, but are rather an integral part of such a system of contract. Where a contract is concluded by a party who does not have the capacity to exercise his or her autonomy (such as an infant),[59] or where a contract was concluded due to duress, mistake, or another procedural defect, the law does not enforce this contract as it is not viewed as a proper expression of the autonomy of the contracting party.[60]

It is unclear why fair price rules that require a combination of objective disparity and evidence of some (lesser) procedural defect, i.e. a problem with the formation of a party's will, could not function in a similar fashion to protect the autonomy of contracting parties.

Gross discrepancy arises often (but not exclusively) in contractual negotiations where one of the parties is able to exploit the circumstances of weakness or ignorance of the other contracting party. This is clear both from the legal systems studied in chapter 3, and the history of the doctrine of *laesio enormis*. The doctrine had its origin as a legal remedy aimed at protecting sellers of land who had fallen on hard times and had been coerced into selling land below its value.[61] During the

[58] See A Barak "Human Dignity" in *Understanding Human Dignity* 361 369.
[59] See for example the short chapter on contractual capacity which is not available in the updated edition, in K Zweigert & H Kötz *An Introduction to Comparative Law* 2 ed (transl T Weir, 1992) 372 380. Zweigert & Kötz suggest that the function of such a restriction is essentially protective, as minors are deemed to unable to exercise their judgement in a proper manner: see *Edelstein v Edelstein NO* 1952 3 SA 1 (A) for a discussion of the historical position in South African contract law.
[60] See Lubbe & Murray *Contract* 20, 21; Van Huyssteen et al *Contract* 10 on autonomy and its limitations, see also 94-96 on the concept of a defective will; see G Wagner "Mandatory Contract Law: Functions and Principles in Light of the Proposal for a Directive on Consumer Rights" (2010) 3 *Erasmus LR* 47 57 for an explanation of how rules on procedural fairness protect the autonomy of contracting parties.
[61] See 2 3 2 above.

Middle Ages the doctrine of *laesio enormis* flourished because it was viewed as a remedy to combat mistake, the abuse of bargaining power, and the exploitation of weakness.[62]

Historically a number of commentators associated the doctrine of *laesio enormis* with fraud, or viewed gross discrepancy in the value of the respective performances as evidence of a procedural defect.[63] In the early modern *ius commune*, a contract could be avoided due to *laesio enormis*; in cases where the disproportion did not meet the threshold of *laesio enormis*, the disproportion could also serve as evidence of *metus* or *dolus.*[64] A similar approach was taken by the erstwhile Prussian Civil Code, which held that while a gross discrepancy in the value of performances did not void a contract in and of itself, it did lead to a presumption of mistake.[65] A similar argument was made by English and US jurists of the 19th and 20th century, who argued that the rationale for not enforcing harsh bargains lay therein that a disparity in price should be considered evidence of fraud.[66]

The simplest manner in which the link between gross discrepancy and the impairment of a contracting party's consent could be explained, is to ask why someone would enter into a contract that is excessively one-sided. Other than when intending to make a gift, it can usually be assumed that a rational and informed individual in a competitive market would not agree to pay significantly more than the normal or market price for the *merx*.[67] This was recognised by Grotius;[68] it is not in the normal intention of parties to a contractual exchange to make a donation, or to enrich their opposing contracting party, at their own expense.

A contracting party might however voluntarily pay marginally more than the market price for a good for a variety of reasons, but the greater the disproportion between

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[62] See 2 6 above. W Decock *Theologians and Contract Law: The Moral Transformation of the Ius Commune (ca. 1500-1650)* (2013) 602; see Lubbe & Murray *Contract* 386.
[63] See 2 4 1 2 and 2 5 1 above; see also J Gordley "Equality in Exchange" (1981) 69 *CLR* 1587 1598-1599 for a discussion of "fraud theory".
[64] See J du Plessis & R Zimmermann "The Relevance of Reverence; Undue Influence Civilian Style" (2003) 10 *Maastricht J of European and Comparative Law* 345 356-357.
[65] See 3 3 2 above; Gordley (1981) *CLR* 1593.
[66] See Gordley (1981) *CLR* 1598-1599, and 1601 for a similar argument from French jurists of the 19th century.
[67] Smith (1996) *LQR* 142, 143; PS Atiyah *Essays on Contract* (1986) 334-335; Benson "Unity" in *Theory of Contract Law* 192.
[68] As discussed above at 2 5 1; see *De Jure Belli ac Pacis* 2 12 11 1.

the market price and the contract price, the greater the chance that the disadvantaged contracting party was not acting voluntarily in choosing to pay this mark-up.[69] There are of course exceptions to this general proposition. One such an exception might be that of the reckless purchaser briefly discussed in chapter 3, where a contracting party does not pay more because he is in distress, but instead does so because he is so wealthy that he is completely indifferent towards the price of a thing, i.e. to him money is no object.[70] Another might be where they purposefully pay more because of personal affection for a certain good.[71] In these two examples, neither of the respective fair price rules studied in Germany nor Austria would find application, precisely because one cannot assume in these circumstances that the disadvantaged party was not acting completely voluntarily.

However, in the absence of such considerations, a third party external to the contract, such as a court, might reasonably conclude that some form of procedural defect is present in cases of gross discrepancy, i.e. that the will of the disadvantaged party is somehow impaired,[72] even without direct proof thereof.[73]

4 2 6 3 Conclusion

Contracting parties enter into a large number of nominally valid contracts, where the consent of a contracting party is nevertheless potentially severely impaired, for example through the exploitation of their ignorance, circumstances of weakness,[74] the manipulation of cognitive biases,[75] and the ubiquity of standard term contracts.[76] The contract cannot realistically be said to be a manifestation of the party autonomy

[69] See 3 3 3 4 above; see also the discussion in Eidenmüller (2015) *ERCL* 225-227
[70] See 3 3 3 4 above.
[71] See 3 4 3 3 and 3 3 3 4 above.
[72] Benson "Unity" in *Theory of Contract Law* 186; 192.
[73] Smith (1996) *LQR* 148.
[74] S Lohsse "Art 4:109: Excessive Benefit or Unfair Advantage" in N Jansen & R Zimmermann (eds) *Commentaries on European Contract Laws* (forthcoming 2018) [1].
[75] For a discussion in the South African context see: S Eiselen & T Naudé "Introduction and Overview of the Consumer Protection Act" in *Commentary on the CPA* (OS 2014) paras 23-24; see on this topic generally YM Atamer "Why Judicial Control of Price Terms in Consumer Contracts might not always be the Right Answer - Insights from Behavioural Law and Economics" (2017) 80 *MLR* 624; O Bar-Gill *Seduction by Contract* (2012); H Collins "Reviews: Oren Bar-Gill Seduction by Contract: Law, Economics, and Psychology in Consumer Markets" (2014) 77 *MLR* 1030.
[76] See for example T Naudé "Introduction to ss 48-52 and reg 44: Structure and Purpose" in *Commentary on the CPA* (RS 2 2017) para 9, 15; see also RA Posner *Economic Analysis of Law* 8 ed (2011) 145.

in many of these cases,[77] yet little recourse is provided to contracting parties in South African contract law.

Why is it that the South African common law of contract provides relief when advantage is taken of the trust and confidence of a contracting party, but fails to provide relief when advantage is taken of the economic distress or circumstances of need of contracting parties?[78] In both of these cases advantage is taken of the weakness or vulnerability of the disadvantaged contracting party, yet South African contract law differentiates between these forms of advantage-taking without it being clear what the qualitative difference is.[79] It is similarly unclear why South African contract law provides relief to contracting parties who conclude extortionate or usurious credit agreements due to inexperience or financial distress, but not to contracting parties who conclude similarly disadvantageous agreements of sale due to the same forms of weakness.[80]

It could be argued that the failure to provide relief to the disadvantaged party in these cases where a defective will is apparent subverts the notion of *pacta sunt servanda*, and the idea that the contract is an expression of the free will of the contracting parties.[81]

A fair price rule could serve to protect the autonomy and empowerment conception of dignity of the contracting parties in cases where the disproportion in the value of performances reveals that a defect in consent was highly likely at the conclusion of the contract; but where the contract could otherwise not be invalidated, either because no direct evidence exists of such a defect, or because the nature of the defect is not material enough by itself to lead to the invalidation of the contract.[82]

In a system of contract law based on party autonomy, a fair price rule might therefore lead to a more comprehensive law of contract that is better able to protect the autonomy of vulnerable contracting parties. While the demands of legal certainty

[77] See Lohsse "Art 4:109" in *Commentaries* [1];
[78] See J du Plessis "Threats and Excessive Benefits or Unfair Advantage" in HL MacQueen & R Zimmermann (eds) *European Contract Law: Scots and South African Perspectives* (2006) 151 166.
[79] 166.
[80] 166-167.
[81] JE du Plessis "Illegal Contracts and the Burden of Proof" (2015) 132 *SALJ* 664 685.
[82] See Smith (1996) *LQR* 142, 143; see also Gordley (1981) *CLR* 1629.

might make it undesirable to scrutinise every contract, the law needs to provide for some way in which the autonomy of disadvantaged contracting parties can be protected in situations where they contract from a position of weakness.[83] Seen from the perspective of the legal community, there needs to be some control mechanism to set aside contracts in cases where a grossly disproportionate contract typically cannot be regarded as a valid expression of the autonomy of the contracting parties concerned.[84] A fair price rule allows us to assert with a reasonable level of certainty that this is the case.

There are limits to this argument, however. It is arguably a matter of policy how much a court should be willing to intervene to protect the autonomy of contracting parties, or what impairments of autonomy the law finds material enough to set aside agreements. It is, for example, unclear to what extent simple inexperience, or a lack of bargaining skill, should be regarded as material defects in autonomy.[85] The traditional position in our law of contract has always been that contracting parties should contract at arm's length, and only be responsible for looking after their own interests.

Ultimately, it therefore appears that the protection of the autonomy of the disadvantaged party could only partially justify a fair price rule. The second part of this chapter shifts the focus from the impaired will of the weaker party, to the effect on the dignity of such a party. It is argued that the exercise of party autonomy should be limited where the detrimental consequences of a contract, and the circumstances under which it was concluded, indicate that it would impair the dignity of the disadvantaged party in an unacceptable manner

[83] See the discussion in M Habersack & R Zimmermann "Legal Change in a Codified System: Recent Developments in Germany Suretyship Law" (1999) 3 *Edinburgh LR* 272 277.
[84] 279.
[85] See Lohsse "Art 4:109" in *Commentaries* [5] who argues that the drafters of the CESL were correct in omitting a lack of bargaining skill from the list of weaknesses; see also the discussion of the classical theory of contract law in HR Hahlo "Unfair Contract Terms in Civil-Law Systems" (1981) 98 *SALJ* 70.

4 2 7 Dignity as a constraint

4 2 7 1 Introduction

The second conception of dignity, that of a constraint, is often said to be at odds with the empowerment conception of dignity, because society should not tolerate those exercises of autonomy that infringe on our dignity, the dignity of others, or the dignity of humanity in general.[86] This conception of dignity might thus subvert, rather than enhance freedom.[87] Considering the difficulties discussed above in defining or delineating the concept of dignity, choosing exactly when the choice of an individual interferes with dignity (of others or themselves) is, however, quite controversial.[88]

Central to the Kantian understanding of dignity discussed above, is the idea that as human beings with the capacity to be moral agents we must treat others with respect, restraint, and as ends in themselves.[89] O'Regan J in *Makwanyane*[90] noted in a similar fashion that the right to dignity is an acknowledgement that human beings are entitled to be treated as worthy of respect and concern. The conception of dignity as a constraint in contract law is prominent in the Constitutional Court judgment of *Botha v Rich NO*,[91] in which Nkabinde J, writing for the majority, states:

> "The principle of reciprocity [of contracts] falls squarely within this understanding of good faith and freedom of contract, based on one's own dignity and freedom as well as respect for the dignity and freedom of others. Bilateral contracts are almost invariably cooperative ventures where two parties have reached a deal involving performances by each in order to benefit both. Honouring that contract cannot, therefore, be a matter of each side pursuing his or her own self-interest without regard to the other party's interests. Good faith is the lens through which we come to understand contracts in that way."

This understanding of dignity therefore seems similar to the Kantian understanding of respect for (the ends of) others as expounded above in the object formulation. The requirement that we have a measure of concern for the ends of other contracting parties might thus be seen as flowing from the injunction against treating others

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[86] See Feldman (1999) *Public Law* 685; Bhana & Pieterse (2005) *SALJ* 881.
[87] Lubbe (2004) *SALJ* 421; Du Plessis *Good Faith and Ubuntu* 221-223.
[88] See for example M Rosaria Marella "Human Dignity in a Different Light" in S Grundmann (ed) *Consitutional Values in European Contract Law* (2008) 123 128-129
[89] See Nussbaum "Human Dignity" in *Human Dignity and Bioethics* 353, 354; Lubbe (2004) *SALJ* 421-422.
[90] Para 328.
[91] 2014 4 SA 124 (CC) para 46; see also the judgement in *Mort v Henry Shields-Chiat* 2001 1 SA 464 (C) 475.

merely as objects.[92] Respecting the dignity of other contracting parties might therefore require that contracting parties refrain from the absolute pursuit of their own self-interest where it results in the destruction of the ends of their contracting partners.

It should be noted that Kantian dignity does not preclude us from using others as a means, inasmuch as it precludes us using others *purely* as means.[93] Indeed we use others as means to our ends in everyday commercial dealings, where the humanity of the other party is arguably of little interest to us.[94] However, it is the essence of cooperative behaviour, such as when a mutually beneficial exchange occurs, that our actions also fulfil the ends of others.

4 2 7 2 Fair price rules as a method to promote the dignity of contracting parties

How does a fair price rule relate to these considerations? A fair price rule seeks to achieve a measure of proportionality between the values of the respective contractual performances. It thus seeks to avoid a situation where the content of a contract is so excessively one-sided, and in outcome so detrimental to the disadvantaged party, that it is completely destructive to their ends.

A fair price rule thus implicitly requires that (stronger) contracting parties cannot have regard only for their own interests, thereby reducing their contracting partners to mere objects or instruments, but that they should instead have a measure of regard for the interests which other contracting parties seek to pursue by entering into a contract.

It has already been noted to above that parties to bilateral contracts arguably intend to conclude exchanges of approximately equal value.[95] Lubbe has also drawn attention thereto that in jurisprudence on the right to dignity and its implications for the law of contract, regard needs to be had for the end that is addressed by the specific contract, in pursuit of which the contracting parties enter into the contract in

[92] See Lubbe (2004) *SALJ* 421.
[93] See Cholbi *Kant's Ethics* 43-44; Du Plessis *Good Faith and Ubuntu* 289.
[94] See Botha (2009) *Stell LR* 184-185 for a critique of the object formula which follows this line of reasoning.
[95] See 4 2 6 2 above.

question, as well as to the principle of reciprocity, which parties seek to achieve with the conclusion of bilateral contracts.[96]

Naudé has argued in similar fashion that the right to dignity in the contractual context might entail that contracting parties should temper the pursuit of their own self-interest by a reasonable measure of concern for the interests of their contracting partners.[97] In the view of Naudé, the protection granted to consumers against unfair contract terms could similarly be seen as giving effect to their Constitutional right to dignity.[98]

Some understandings of human dignity also place emphasis thereon that in order for people to live dignified lives, to develop their potential, and to exercise their free will and autonomy, they need to attain at least a minimum level of subsistence.[99] In the South African context the Constitution, and especially the socio-economic rights contained therein, arguably serve as an indication of what can be considered the necessarily elements for a dignified life.[100]

However, it should be kept in mind that the impact of an imbalanced contract on the dignity of contracting parties is necessarily contextual, and the concern which the law should have for the infringement of their dignity depends in part on the circumstances of the specific case. Consider again the example of the reckless purchaser discussed above,[101] who is so wealthy that he is indifferent to the price of the thing which he is buying. As he pays more for a thing not because of some form of weakness, but rather because money is no object to him, an imbalanced contract will have little effect on his ability to live a dignified life. This means that in order for a court to properly consider the impact which an imbalanced contract has on the contracting parties, it might need to inquire into the relative positions of the parties involved, and the circumstances under which the contract was concluded.

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[96] Lubbe (2004) *SALJ* 422; see also G Lubbe "Bona Fides, Billikheid en Openbare Belang" (1990) 1 *Stell LR* 1 23-24.
[97] Naudé "Introduction to ss 48-52 and reg 44" in *Commentary on the CPA* para 8.
[98] Para 8.
[99] See for example S Liebenberg "The Value of Human Dignity in Interpreting Socio-Economic Rights" (2005) 21 *SAJHR* 1 1-3; Barak "Human Dignity" in *Understanding Human Dignity* 369.
[100] See Liebenberg (2005) *SAJHR* 2.
[101] See 3 3 3 4 above.

4 2 7 3 A case study from Germany: The Bürgschaft case

A good example of the logic of dignity as a constraint is provided by the famous decision of the German Federal Constitutional Court (*Bundesverfassungsgericht*) in the so-called *Bürgschaft* (surety) case, where the court refused to enforce a surety agreement because it would have been inconsistent with protecting the private autonomy of the guarantor.[102] Human dignity is regarded as a foundational principle in German law, and is closely related to private autonomy, which is "regarded as giving expression to the substantive meaning of human dignity".[103]

When discussing this example, it should be kept in mind that suretyships tend by their very nature to be one-sided. Since it therefore cannot be argued that equality in exchange is intended in surety agreements, fair price rules would logically not find application to such agreements. Indeed it is stressed in some literature that rules which focus on defects in consent, and especially undue influence on the surety, are better able to provide relief to disadvantaged parties in these cases.[104] The example therefore relates to the manner in which the court applied the logic of dignity as a constraint in refusing to enforce an excessively one-sided contract in order to protect the dignity and autonomy of the weaker contracting party.

The case concerned a daughter who at age 21, with only meagre income and no professional training, entered into a surety agreement with a bank for the debts of her father.[105] Although initially not an exorbitant sum, these debts increased within two years to an amount equal to more than a million euro; more than she would ever be able to pay back.

The case was referred to the *Bundesverfassungsgericht* on the basis that the decision to enforce the contract had infringed on her basic rights to live a dignified life,[106] and to party autonomy ("the right to free development of the human

[102] BVerfG, BVerfGE 89, 214.
[103] HA Strydom "Freedom of Contract and Constitutional Rights: A Noteworthy Decision by the German Constitutional Court" (1995) 58 *THRHR* 696.
[104] See N Jansen "Seriositätskontrollen Existentiell Belastender Versprechen" in R Zimmermann (ed) *Störungen der Willensbildung bei Vertragsschluss* (2007) 125 146-147, 159-160.
[105] C Mak *Fundamental Rights in European Contract Law* (2008) 76.
[106] *1 (1) Die Würde des Menschen ist unantastbar. Sie zu achten und zu schützen ist Verpflichtung aller staatlichen Gewalt.*

personality")[107] guaranteed under articles 1(1) and 2(1) of the German Constitution ("*Grundgesetz"*) respectively,[108] as well as going against the "Social State Principle" (*Soziaalstaatprinzip*) contained in articles 20(1) and 28(1) of the *Grundgesetz*,[109] which mandates that the actions of the state should be directed at the attainment of certain social-economic and social-political aims (such as ensuring that all citizens enjoy a minimum level of welfare).

The guarantor argued that the economic burden placed on her by the contract violated her human dignity in that it would reduce her to an object, and severely restrict her ability to maintain a dignified existence.[110]

The *Bundesverfassungsgericht* noted that, while the private autonomy of both parties could be raised in equal measure in private law disputes, if the will of one party dominates over the will of the other to such an extent that said party can unilaterally establish the content of the contract, and if the content is exceptionally detrimental to the other party, the law needs to intervene in order to protect the private autonomy of the structurally weaker party.[111] This duty to "interfere correctively" stemmed from the need to protect a person's private autonomy under article 2(1) of the *Grundgesetz*.[112]

In the case at hand the *Bundesverfassungsgericht* found that the manner in which the contract was concluded, the one-sided nature thereof, and the exceptional risk assumed, placed a duty on the bank to inform the guarantor of the nature and scope of her obligations (despite no such a general duty existing).[113] In denying such a duty to inform, the court from which the appeal was heard, the *Bundesgerichtshof*, had failed to protect the autonomy of the weaker party.[114] After being redirected back to

[107] See Strydom (1995) *THRHR* 696; The phrase in German is: "*2 (1) Jeder hat das Recht auf die freie Entfaltung seiner Persönlichkeit, soweit er nicht die Rechte anderer verletzt und nicht gegen die verfassungsmäßige Ordnung oder das Sittengesetz verstößt.*"
[108] Mak *Fundamental Rights* 77.
[109] 77.
[110] Strydom (1995) *THRHR* 697.
[111] Mak *Fundamental Rights* 78.
[112] Strydom (1995) *THRHR* 697.
[113] Mak *Fundamental Rights* 79; Strydom (1995) *THRHR* 697.
[114] Mak *Fundamental Rights* 79.

the *Bundesgerichtshof,* the agreement was declared null and void under § 138 (1) BGB,[115] since it was held to be *contra bonos mores*.[116]

The conception of dignity as a constraint could be applied in similar fashion in the application of a fair price rule. The logic of dignity as a constraint might thus support the proposition that a court should set aside contracts if the detrimental consequences of the contract, and the circumstances under which it was concluded, indicate that it would impair the dignity of the disadvantaged party in an unacceptable manner.[117]

Lubbe has argued in similar fashion that the conception of dignity as a constraint is reflected in the decision in *Sasfin (Pty) Ltd v Beukes*,[118] where the court found that a contract which was so one-sided, and its terms so oppressive, that it would have the effect of depriving the disadvantaged party of his income and means of supporting his family, in effect reducing him to a slave, was contrary to public policy.[119]

A fair price rule might therefore give expression to the conception of dignity as a constraint through limiting the "obscene excesses" of the exercise of party autonomy. It has been argued above that respecting the dignity of other contracting parties requires the curtailment of self-interest, in favour of showing a measure of regard for the interests of other contracting parties.

In extreme circumstances such an approach might justify the setting aside of a contract based merely on the grossly disproportionate nature of the price. In the majority of cases it would, however, be more appropriate for a court to take into account the circumstances under which the contract was concluded in order to better understand the effect which the contract has on the ability of the disadvantaged party to live a dignified life.

[115] See 3 3 3 above.
[116] Mak *Fundamental Rights* 79.
[117] See for example the discussion in Du Plessis *Good Faith and Ubuntu* 286-287, 291.
[118] 1989 1 SA 1 (A).
[119] See Lubbe (2004) *SALJ* 422; see also Du Plessis *Good Faith and Ubuntu* 289-290.

4 2 7 4 Fair price rules as a manifestation of the concept of Ubuntu

It is sometimes stated that contract law seems to be resistant to the notion of *Ubuntu*,[120] and that it is highly desirable and necessary that the law of contract should be infused with constitutional values such as *Ubuntu*.[121] The meaning of the concept *Ubuntu*, and close relationship which it has with human dignity, have been elaborated on in a number of Constitutional Court cases, and especially in the *dicta* of Justice Mokgoro.[122]

A more comprehensive discussion of the meaning of *Ubuntu*, and the role it can play in South African contract law is beyond the scope of the current study. The second part of this chapter has argued that a fair price rule can give expression to the conception of dignity as a restraint, which requires that we should have a respect and a measure of regard for the interests of other contracting parties. It would seem that an understanding of *Ubuntu*, which places an emphasis on mutual respect, and the recognition of the humanity and dignity inherent in others,[123] would support the institution of a fair price rule, as a concrete manifestation of this duty to respect the humanity of others.

4 2 7 5 Fair price rules as a manifestation of good faith

Although calls for a greater role for good faith abound in the South African contract law,[124] it has been the standard position, reflected in judgments like *Brisley v Drotsky*,[125] that good faith does not function as an independent or free-floating basis which can be used to escape from, or set aside, contractual agreements that appear

[120] TW Bennet "Ubuntu: An African Equity" in F Diedrich (ed) *Ubuntu, Good Faith & Equity: Flexible Legal Principles in Developing a Contemporary Jurisprudence* (2011) 3 13; Du Plessis *Good Faith and Ubuntu* 175.
[121] See for example *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 1 SA 256 (CC) para 71; D Cornell "A Call for Nuanced Constitutional Jurisprudence: Ubuntu, Dignity, and Reconciliation" (2004) 19 *SAPL* 666.
[122] For an overview of these judgments see Bennet "Ubuntu" in *Ubuntu, Good Faith & Equity* 5-12; see also Cornell (2004) *SAPL* 669-673 on the interrelation of a Kantian approach to dignity and *Ubuntu*, as well on the approach of Mokgoro J, to *Ubuntu*; see also Du Plessis *Good Faith and Ubuntu* 95-98.
[123] See for example the explanation provided by Justice JY Mokgoro writing extra-judicially in: JY Mokgoro "Ubuntu as a Legal Principle in an Ever-Changing World" in F Diedrich (ed) *Ubuntu, Good Faith & Equity: Flexible Legal Principles in Developing a Contemporary Jurisprudence* (2011) 1.
[124] See for example AM Louw "Yet Another Call for a Greater Role for Good Faith in the South African Law of Contract" (2013) 16 *Potchefstroom Electronic LJ* 44; D Bhana & M Pieterse "Towards a Reconciliation of Contract Law and Constitutional Values: Brisley and Afrox Revisited" (2005) 122 *SALJ* 865 889-890.
[125] 2002 4 SA 1 (SCA).

to be unfair on unreasonable.[126] Good faith, it is argued, is too abstract and indeterminate, and therefore too dependent on the subjective values of the judge to function by itself as a substantive legal rule.[127] Rather it is usually submitted that good faith is a principle or ethical value that underlies and informs our law of contract.[128] It can fulfil a creative function in the development of substantive rules of contract, a controlling function through already established rules of contract law, and a legitimising function in relation to existing legal rules.[129]

Good faith as a legal norm has been described as a standard of honest, open, and considerate behaviour, characterised by acting with due regard,[130] or a minimum degree of respect for the interests of opposing contracting parties.[131] It was similarly stated in the passage from *Botha v Rich NO*[132] quoted above, that the understanding of good faith of the court entails respect for the freedom and dignity of others. The judgment in *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd*,[133] placed renewed emphasis on the importance of good faith and suggested that good faith might in fact attain a more prominent role in future in South African contract law.[134]

Good faith has functioned historically to infuse the South African law of contract with an equitable spirit,[135] and has been closely tied with concepts of justice,

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[126] For an analysis of the position with regards to the role of good faith in contract law after this judgment see Lubbe (2004) *SALJ* 396-399; see also D Hutchison "Non-Variation Clauses in Contract: Any Escape from the Shifren Straitjacket?" (2001) 118 *SALJ* 720 743; FDJ Brand "The Role of Good Faith, Equity and Fairness in the South African Law of Contract: The Influence of the Common Law and the Constitution" (2009) 126 *SALJ* 71 80-83; see also the judgment in *Bredenkamp v Standard Bank of SA Ltd* 2010 4 SA 468 (SCA) para 39.

[127] See for example Lubbe & Murray *Contract* 390, 391.

[128] Hutchison (2001) *SALJ* 743; D Hutchison "Good Faith in Contract the South African Law of Contract" in R Brownsword, NJ Hird, & G Howells *Good Faith in Contract: Concept and Context* (1999) 213; see also *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 1 SA 256 (CC) para 22.

[129] See Van Huyssteen et al *Contract* 313; see Brand (2009) *SALJ* 82; Hutchison (2001) *SALJ* 744; see also *South African Forestry Co Ltd v York Timbers Ltd* 2005 3 SA 323 (SCA).

[130] See S Whittaker & R Zimmermann "Good Faith in European Contract Law: Surveying the Legal Landscape" in R Zimmermann & S Whittaker (eds) *Good Faith in European Contract Law* (2000) 7 31.

[131] See R Zimmermann "Good Faith and Equity" in R Zimmermann & D Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* (1996) 217 259-260; Naudé "Introduction to ss 48-52 and reg 44" in *Commentary on the CPA* para 8; Van Huyssteen et al *Contract* 313; Bhana & Pieterse (2005) *SALJ* 890; see also the definition of good faith and fair dealing in DCFR I.-1:103 (1), and Art 2(b) CESL, which define "good faith" in a similar fashion.

[132] 2014 4 SA 124 (CC) para 46.

[133] 2012 1 SA 256 (CC) para 22.

[134] See in this regard: Du Plessis *Good Faith and Ubuntu* 170-175.

[135] See Zimmermann "Good Faith and Equity" in *Southern Cross* 218-220.

reasonableness, and fairness.[136] It was also noted above that the medieval civilians viewed the prohibition against overreaching (i.e. against exacting a harsh bargain) as flowing from the general principle of good faith.[137] As discussed in chapter 2, the Roman-Dutch jurist Voet seems to have similarly viewed the doctrine of *laesio enormis* as an expression of the general action based on good faith.[138] It has similarly been stated that the fair price rule in Article 3.2.7 PICC is an expression of the principle of good faith and fair dealing.[139]

All of these characterisations of good faith, both locally and internationally, have in common that they require that contracting parties should show some regard or respect for the interests of other contracting parties. It would seem therefore that a fair price rule, based in part on the argument explained above, that contracting parties should have a measure of regard for the interests of other contracting parties and therefore refrain from the conclusion of grossly disproportionate contracts, could function to give concrete expression to the abstract principle and value of good faith.

4 2 7 6 Conclusion

While it is often argued that values such as dignity, good faith, and *Ubuntu* should play a greater role in South African contract law,[140] there seems to be a lack of entry points for such normative values to find expression in legal rules. Construed and understood as set out above, a fair price rule can serve to promote and protect the dignity of contracting parties; both within an empowerment conception of dignity, where it serves to protect the autonomy of contracting parties in situations where it is likely that their will was somehow impaired at the time of contract conclusion, and within a constraint conception of dignity, where it can give effect to the Kantian imperative that we should not act in such a way that others are reduced to mere

[136] See *Tuckers Land and Development Corporation (Pty) Ltd v Hovis* 1980 1 SA 645 (A) 651; *Botha v Rich NO* 2014 4 SA 124 (CC) para 45; Brand (2009) *SALJ* 73.
[137] J Gordley "Good Faith in the Medieval *Ius Commune*" in *Good Faith in European Contract Law* 93 102.
[138] See 2 5 1 above; see also Voet *Commentarius ad Pandectas* 18 5 4; RWM Dias "Laesio Enormis*:* The Roman Dutch Story" in D Daube (ed*) Studies in Roman Law of Sale* (1959) 46 47.
[139] JE du Plessis "Grounds for Avoidance" in S Vogenauer (ed) *Commentary on the UNIDROIT Principles of International Commercial Contracts* 2 ed (2015) 511.
[140] See for example: D Davis "Private Law after 1994: Progressive Development or Schizoid Confusion?" (2008) 24 *SAJHR* 318; see also the citations above in nn 124 and 121.

objects. In a similar fashion, it is argued that a fair price rule can give concrete expression to the abstract values of *Ubuntu* and good faith.

4 3 Legal certainty

It is often argued that granting courts the equitable discretion to set aside contracts on the basis of unfairness or unreasonableness would lead to a greater degree of legal and commercial uncertainty.[141] Judges might be tempted to set aside contracts merely because it offends against their idiosyncratic sense of justice or fairness.[142] This would in turn lead to vexatious and opportunistic litigation as contracting parties attempt to escape bad bargains.[143]

However, a fair price rule must be clearly distinguished from some broad rule that grants judges blanket discretion to strike down contracts which they deem to be unfair. Properly construed, a fair price rule will only grant parties an opportunity to escape a contract under a specific set of circumstances, which should not apply to the overwhelming majority of contractual agreements.

A comparative perspective reveals that as more binding case law is created on the topic of a fair price rule, judges would increasingly rely on guidelines and precedent laid down by the courts. In this sense the introduction of a fair price rule might be compared to the introduction of undue influence as a ground for setting aside a contract in *Preller v Jordaan*.[144] Any such a change initially creates a measure of uncertainty, which is mitigated as the legal position becomes clearer over time.

There is also evidence that, in the absence of a mechanism such as a fair price rule that gives courts a clear metric for setting aside grossly unfair contracts, courts tend do so anyway by making use of a variety of non-systematic and blurry concepts,[145] or by stretching traditional grounds of procedural unfairness,[146] such as fraud,[147] economic duress,[148] undue influence,[149] or inequality of bargaining power.[150]

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[141] See for example M Wallis "The Common Law's Cool Ideas for Dealing with Ms Hubbard" (2015) 132 *SALJ* 940 958-960; Hutchison (2001) *SALJ* 743-744; Brand (2009) *SALJ* 81.
[142] Hutchison (2001) *SALJ* 733; FDJ Brand "The Role of Good Faith, Equity and Fairness in the South African Law of Contract: A Further Instalment" (2016) 27 *Stell LR* 238 242.
[143] See for example Eidenmüller (2015) *ERCL* 227.
[144] 1956 1 SA 483 (A).
[145] See Gutmann (2013) *Law and Contemporary Problems* 54; Smith (1996) *LQR* 140 makes a similar claim, arguing that while courts often pay lip-service to orthodox theories of contract law which hold

It can be observed that fair price rules exist in a number of foreign jurisdictions as discussed in chapter 3, yet there is little evidence, for example, that an untenable degree of legal uncertainty has been created in Germany through use of courts of the power to strike down unfair agreements in terms of § 138 (1) BGB. In Austria, an amendment of § 935 ABGB in 1979[151] prohibited the contractual exclusion of § 934 ABGB, which had the effect that the application of the doctrine of *laesio enormis* went from being excluded routinely by standard contract terms, to being available (to consumers) in all transactions. However, Austrian literature from the period reveals little indication of the great upheaval which many suggest would follow from the sudden introduction of such a stringent fair price rule based almost exclusively on disproportion.[152]

It can also be noted that much of the legal uncertainty caused by the doctrine of *laesio enormis* before its abolition in South Africa was arguably due to a number of open questions regarding its application, and not by uncertainty inherent in the rule itself.[153] Since the promulgation of the Consumer Protection Act 68 of 2008, South African consumer contract law has also had a type of fair price rule in section 48(1)(a)(i) of the Act,[154] without any obvious indication of wide-spread abuse or opportunistic application of the provision.

While it is difficult to estimate *ex ante*, it would seem that the introduction of a fair price rule might not necessarily have the dire effect on legal certainty which is

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that substantive fairness plays no role in judging the validity of a contract, they do indeed take the substantive fairness of the contract price into account in practice.

[146] See A Fleming "The Rise and Fall of Unconscionability as the 'Law of the Poor'" (2014) 102 *Georgetown LR* 1383 1390. Fleming argues that before the District of Columbia adopted the doctrine of unconscionability as part of the Uniform Commercial Code in 1963, judges would nevertheless find ways not to enforce harsh or one-sided bargains through stretching the traditional grounds of procedural unfairness, or through purposively interpreting the contracts in a strange manner.

[147] See Lohsse "Art 4:109" in *Commentaries* [3] who states that French courts resort to a wide interpretation of fraud (*dol*) in order to provide relief in cases of exploitation of weakness.

[148] See the discussion of economic duress above at 3 6 3.

[149] See the discussion of undue influence in English law above at 3 6 4.

[150] See the discussion of a general doctrine based on unconscionability above at 3 6 5.

[151] 3 4 2 above.

[152] See for example: P Bydlinski "Die Stellung der Laesio Enormis im Vertragsrecht" (1983) 105 *JBL* 410; see especially T Mayer-Maly "Renaissance der Laesio Enormis" in C-W Canaris & U Diederichsen (eds) *Festschrift für Karl Larenz zum 80. Geburtstag* (1983) 395 398-399. Mayer-Maly is immensely critical of the elevation of *laesio enormis* to mandatory law, but does not relate this at all to an increase in legal uncertainty, or to a flood of litigation, but rather criticises the fact that the lawgiver seemed to be motivated by socio-political concerns.

[153] This is briefly discussed in 5 1 below.

[154] This provision is discussed in detail below at 6 3.

sometimes attributed to other remedies which afford judges an equitable discretion. As with any change of a legal rule, and especially with the introduction of a rule which requires a measure of discretion to be exercised, there is bound to be, at least temporarily, some increase in uncertainty.[155] If the rule is properly construed, and the courts are transparent in setting out how the rule functions, this uncertainty could be mitigated.[156]

Lastly it should be noted that while legal certainty is an important pragmatic consideration that should not be belittled, it is not paramount. There might therefore be cases where the interests of justice should prevail over the maintenance of legal certainty when these two values do come into conflict.[157]

4 4 Economic efficiency

4 4 1 Introduction

It is sometimes asserted that a fair price rule is unfit for the modern market economy,[158] or that it is in the interest of the functioning of the free market economy that courts not become involved in price control.[159] The knowledge that freely-concluded contracts will be enforced, regardless of whether or not they are fair, promotes legal and economic certainty, which is essential for the functioning of the free-market economy.[160]

However, it is difficult to find empirical evidence on a macro-economic level of the effect of fair price rules. As was noted above in relation to certainty, there are many jurisdictions in which a variety of fair price rules exist, and yet there appears to be

[155] See for example the discussion in the judgment of Sachs J in *Barkhuizen v Napier* 2007 5 SA 323 (CC) paras 168-172.
[156] See 5 1 below, and chapter 5 generally on the application of a fair price rule.
[157] See again the discussion in *Barkhuizen v Napier* 2007 5 SA 323 (CC) paras 168-172.
[158] See for example *Tjollo Ateljees (Eins) Bpk v Small* 1949 1 SA 856 (A) 860.
[159] See HE Brandner & P Ulmer "The Community Directive on Unfair Terms in Consumer Contracts: Some Critical Remarks on the Proposal Submitted by the EC Commission" (1991) *Common Market Law Review* 647 656; EP van Eeden *A Guide to the Consumer Protection Act* (2009); EP van Eeden *Consumer Protection Law in South Africa* (2013) 261-262.
[160] See Hutchison "The Nature and Basis of Contract" in D Hutchison & C Pretorius (eds) *The Law of Contract in South Africa* 3 ed (2017) 3 23.

little indication that § 138 BGB, or § 934 AGBG have had adverse economic effects in Germany or Austria.[161]

Standard economic theory in relation to price formation operates on the assumption that prices do not need to be controlled as market forces are adequate for achieving an efficient allocation of resources.[162] The market is supposedly populated by rational and well-informed contract parties who enter into contracts in order to maximise their utility.[163] These utility-maximising consumers on the one side, and profit-maximising producers on the other, operate in a perfectly competitive market, and will therefore agree on the most economically efficient equilibrium price.[164] The standard position is therefore that all contracts that are entered into voluntarily, and do not produce negative externalities, should be enforced.[165]

However, this model depends on a number of assumptions that are constantly challenged in practice.[166] Not only are markets routinely full of imperfections,[167] but consumers are also routinely ill-informed and seemingly irrational in their choices.[168] It should also be noted that where the ability of contracting parties to make a rational choice is somehow impaired (such as in situations where they are acting under the influence of fraud or duress) their promises should not necessarily be enforced as they might not lead to an efficient resource allocation.[169]

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[161] See also A Somma "Art. 4:109" in L Antoniolli & A Veneziano (eds) *Principles of European Contract Law and Italian Law* (2005) [1] who argues that the success of the doctrine of *laesio enormis* in France and Austria indicates that it is compatible with individualistic or economic utilitarian policies.
[162] See Wagner (2010) *Erasmus LR* 51-52; Atamer (2017) *MLR* 627-629.
[163] Atamer (2017) *MLR* 627.
[164] 627.
[165] See for example EA Posner "Contract Law in The Welfare State: A Defense of the Unconscionability Doctrine, Usury Laws, and Related Limitations on the Freedom to Contract" (1995) 24 *JLS* 283 295.
[166] See P Sutherland & K Kemp *Competition Law of South* Africa (2017) 1.4.1 for the theoretical assumptions and preconditions on which neo-classical price theory is built; see Atamer (2017) *MLR* 626-628 on the challenges to and shortcomings of neo-classical price theory.
[167] Atamer (2017) *MLR* 628.
[168] 628.
[169] See S Shavell *Foundations of Economic Analysis of Law* (2004) 339-337 for economic justifications of the doctrines of fraud, mistake, and duress; see also Wagner (2010) *Erasmus LR* 53, 57.

4 4 2 The economic efficiency of fair price rules

Against this background, Eidenmüller has engaged most recently and directly with the question of whether a fair price rule would be economically efficient.[170] According to him, legal rules can be considered economically efficient if they maximise or increase societal welfare.[171] Eidenmüller has earlier adopted the view that a contract is inefficient if the cost (usually the price in a competitive market) exceeds the benefit that accrues to the consumer (or the disadvantaged contracting party in our case).[172] He comes to the conclusion that a fair price rule as proposed in the CESL,[173] which requires only objective disproportion between the value of the respective performances in order for the contract to be set aside, would be inefficient.[174] He advances two primary arguments for this conclusion:

He argues firstly that the objective discrepancy required by the fair price rule in the CESL is simply too little, as it merely refers to a "significant imbalance" between the value of the performances.[175] By contrast, if the objective discrepancy required had been great, for example 100% of the market price of the good (as with the doctrine of *laesio enormis*), this would in his view establish at least a rebuttable presumption that the disadvantaged party had acted against his interest by concluding a transaction that resulted in a net welfare reduction, and is therefore inefficient.[176] Both the late scholastics and the Roman-Dutch authorities similarly recognised that minor deviations from the market price are to be unavoidable in a market economy, and that contract law is therefore only able to correct significant deviations from the market price.[177] However, the greater the deviation from the market price, the less likely it becomes that the benefit that accrues to the disadvantaged party is greater than the cost, and in this sense the contract is more likely to be inefficient.

Eidenmüller argues secondly that if a fair price rule only looks at objective disproportion, and not at the contract conclusion, it is not possible to assert with

[170] See Eidenmüller (2015) *ERCL* 220.
[171] 225.
[172] Eidenmüller (2011) *ERCL* 5.
[173] This was briefly discussed above at 3 5 7 2.
[174] Eidenmüller (2015) *ERCL* 222-223.
[175] 227.
[176] 227.
[177] See 2 4 3 2 and 2 5 1 above.

reasonable certainty that the contract was inefficient.[178] He highlights that there may be a variety of reasons why one party would voluntarily pay more than the market price, even if it is just incrementally more.[179] The excess might for example be intended a partial donation, or as a signal to the other party that they will take good care of the *merx*.[180] It is therefore difficult to assert based only on objective disproportion that a contract is inefficient. If by contrast there is evidence of a procedural defect in the conclusion of the contract, such as the abuse of circumstances, economic duress, information asymmetries, or an inability of one of the parties to understand the benefits of a complex contract, it could be asserted that the circumstances under which the contract was concluded create a significant likelihood that the disadvantaged party was not able to act in their best interest.[181]

While it is difficult to assert that all contracts of a certain type will necessarily be efficient, or *vice versa*, the position that excessive contract prices which are induced by the exploitation of circumstances should not be enforced seems to be supported by almost all academics who engage with the topic.[182]

This example can best be understood within the context of rescue at sea. Suppose a rescue ship operated by a salvage company finds a distressed ship at sea, and offers to tug it back to shore for an excessive price, many times above the customary market price for such a service, equal to almost the entire value of the ship and its cargo.[183] Both parties are in this case better off if they choose to enter into the contract; *prima facie* it is therefore not a disadvantageous or inefficient contract.[184] The captain of the ship would lose his ship and his cargo if he does not enter into the contract. Any price below the total worth of that would therefore be beneficial to him. The question then is whether this excessive price should later be enforced? The answer in admiralty law,[185] French law,[186] and the US law[187] is that the excessive

[178] Eidenmüller (2015) *ERCL* 222-223.
[179] See 224.
[180] 224.
[181] See 225-227
[182] See for example Eidenmüller (2015) *ERCL* 226; Posner *Economic Analysis* 147-148; Shavell *Economic Analysis* 336-337; see also Gordley (1981) *CLR* 1635; Buckley (1990) *Hofstra LR* 41.
[183] This very common example is from Posner *Economic Analysis* 147-148.
[184] See the example in Eidenmüller (2015) *ERCL* 226.
[185] See Posner *Economic Analysis* 147.
[186] See Gordley (1981) *CLR* 1626.
[187] 1635.

price should not be enforced. The rescuer should instead be awarded a reasonable fee for their services.[188]

A number of reasons are provided for why the excessive price should not be enforced. Shavell argues that allowing excessive prices imposes a high risk on individuals that their circumstances might be exploited, which necessitates taking excessive and often socially costly precautions, while a modest or reasonable fee might also have effected rescue.[189] Landes and Posner have shown in similar fashion that enforcing the excessive price would lead to an inefficient allocation of resources spent both on precautionary measures on the side of those in risk, and to excessive resources being allocated to rescue operations by parties wishing to extract extortionate terms from those in distress.[190] Eidenmüller argues that allowing an excessive price to be charged in such cases might even incentivise rescuers to create such "rescue situations" so that they might exploit them for their own gain.[191]

There may therefore be two primary reasons why grossly disproportionate contracts might be inefficient. First, the grossly disproportionate nature of the contract, and the circumstances under which it was concluded, may reflect a significant likelihood that the disadvantaged party acted against his best interest. Secondly, such contracts might create inefficient incentives for the contracting parties, or for third parties as demonstrated in the example regarding rescue situations above.[192]

A number of other theories have been advanced that might be said to support the economic efficiency of fair price rules. Eric Posner has attempted to show for example that doctrines which prohibit unconscionable or usurious contracts serve a desirable social function as they deter or mitigate socially costly behaviour such as the extension of high risk debt to those in a vulnerable position, and especially to the poor.[193] Buckley has also tried to show that unconscionability doctrines can be

[188] See Posner *Economic Analysis* 147; see Gordley (1981) *CLR* 1635.
[189] See Shavell *Economic Analysis* 336-337 (see especially n 20).
[190] See WM Landes & RA Posner "Salvors, Finders, Good Samaritans, and other Rescuers: An Economic Study of Law and Altruism" (1978) 7 *JLS* 83 100-102. See also Posner *Economic Analysis* 147.
[191] See Eidenmüller (2015) *ERCL* 226; Buckley (1990) *Hofstra LR* 46.
[192] Eidenmüller (2015) *ERCL* 226.
[193] Posner (1995) *JLS* 301, 302.

justified in terms of incentive theories, as well as in terms of cooperation theories. Buckley, relying on the assumption that price control by courts will change the expectations of contracting parties in bargaining situations,[194] argues that while a fair price rule might lead to the setting aside of some efficient contracts over the short term, it may in fact lead to a significant increase in the number of contracts being concluded, since contracting parties will react to the introduction of fairness norms by adopting a more co-operative, or less extreme bargaining approach.[195]

Smith has attempted to show that excessive prices lead to a deadweight loss as potential contracting parties are priced out of the market and contracts which would otherwise have been mutually beneficial are never concluded.[196]

4 4 3 Conclusion

In this section it has been argued that the economic effect of a fair price rule is ambiguous. It is clear from the number of jurisdictions with a fair price rule that it is by no means fatal to the modern market economy. Nevertheless it may lead to efficiency losses where and if efficient contracts are set aside. Properly construed, however, such a rule might lead to some efficiency gains where it functions to allow parties to escape from economically inefficient contracts, or to prevent rent-seeking behaviour by those wishing to exploit the circumstances of others.

4 5 Conclusion

Would the recognition of a fair price rule be a desirable development in our common law of contract?

This chapter has demonstrated that a fair price rule is not incompatible with a theory of contract that values the dignity or autonomy of contracting parties, as some of its detractors would suggest. On the contrary such a rule would arguably lead to a more comprehensive law of contract that is better able to protect the autonomy of vulnerable contracting parties where the disproportion in the value of contractual performances reveals that a defect in consent was highly likely at the conclusion of

[194] Buckley (1990) *Hofstra LR* 48.
[195] 48-50.
[196] Smith (1996) *LQR* 148-149.

the contract, and that the contract therefore cannot be regarded as a valid expression of the autonomy of the contracting parties concerned. In this way, a fair price rule promotes the empowerment conception of dignity.

The protection of autonomy is, however, only part of the justification of a fair price rule. Through setting aside grossly disproportionate contracts, especially where they are destructive to the ends of weaker contracting parties, and thereby limiting the "obscene excesses" of the exercise of party autonomy, a fair price rule can also give expression to the conception of dignity as a constraint. In similar fashion, the implicit duty to respect the ends of opposing contracting parties can be viewed as a manifestation of the values of good faith, and *Ubuntu*.

The effect which the introduction of a fair price rule would have on both legal certainty and economic efficiency is rather more ambiguous. While it needs to be conceded that it will lead to both a measure of legal uncertainty, as well as the avoidance of at least some economically efficient contracts, it is argued that the presence of fair price rules in a number of prominent foreign jurisdictions suggests that it is neither fatal to legal certainty nor economic efficiency. It could also be argued on the contrary, that properly construed a fair price rule might in fact lead to efficiency gains through setting aside inefficient contracts, and through removing incentives which lead to inefficient behaviour on the part of contracting parties.

The extent to which fair price rules can give effect to these values will ultimately be a function of how these rules will be construed and applied in practice. It is to this question that the study will now turn.

CHAPTER 5: THE APPLICATION OF FAIR PRICE RULES

5 1 Introduction

Perhaps the most common criticism of a fair price rule is that it is difficult to determine how it should function.[1] Thomasius famously compared the doctrine of *laesio enormis* to a hydra, with every question answered giving rise to another two.[2] Prior to its abolition, the doctrine of *laesio enormis* was similarly criticised in South Africa due to the many questions regarding its application. Was it for example applicable to contracts other than sale, and could it be applied to movables, and if so, to all movables, or only to expensive movables? Could it be applied where speculation was inherent in the sale?[3] And so forth. These considerations led Watermeyer CJ, to remark in *Tjollo Ateljees (Eins) Bpk v Small* ("*Tjollo Ateljees*")[4] that it was virtually impossible to arrive at any certainty with regard to the legal principles underlying the application of the doctrine.

However, it may be questioned whether these problems are indeed so serious that they stand in the way of the recognition of a fair price rule in modern South African contract law. Much of the criticism in legal literature relates specifically to the doctrine of *laesio enormis*, and the very apparent shortcomings in its application. If the legislator and the courts are pro-active and transparent in setting out how a fair price rule functions, many of these challenges could potentially be avoided. How could a fair price rule be construed so as to avoid these familiar pitfalls? This chapter will seek to provide some answers to this question, mainly by examining how fair price rules function comparatively in the legal systems studied in chapter 3, and by assessing these approaches against the values studied in chapter 4.

[1] See for example H Eidenmüller "Justifying Fair Price Rules in Contract Law" (2015) 11 *ERCL* 220 222; R Zimmermann *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1990) 263.
[2] See the discussion in Zimmermann *Obligations* 263.
[3] See for example the discussion on the doctrine in HR Hahlo & E Kahn "Two Important Changes in the Common Law" (1952) 69 *SALJ* 392 393-396; see also J Barnard "Unfairness of Price and the Doctrine of *Laesio Enormis* in Consumer Sales" (2013) 76 *THRHR* 521 524-526 for a brief overview of cases involving the doctrine of *laesio enormis* in South African before its abolition; see also *Cotas v Williams* 1947 2 SA 1154 (T) 1162.
[4] 1949 1 SA 856 (A) 860.

5 2 What is a fair price / *iustum pretium*?

5 2 1 What should be used as the guideline for the fair price?

The preceding comparative and historical chapters revealed a general understanding that the fairness of a price is usually determined with reference to market prices.[5] The fair price is defined as the market price by law in Austria,[6] and Louisiana,[7] and is understood as such by courts in Germany.[8] This also seems to have been the practice of courts in South Africa before the doctrine of *laesio enormis* was abolished.[9]

However, just because the market price traditionally is used as the guideline for a fair price, it does not follow that it is necessarily the best approach, or that a number of other approaches cannot be considered in the determination of a fair price. The next section will briefly consider various approaches which are prominent in historical and comparative literature, and consider what value these approaches might have for modern South African law.

5 2 1 1 Metaphysical or intrinsic value

The idea (often wrongly) associated with medieval jurists that the doctrine of *laesio enormis* (or any fair price rule for that matter) conceived of a fair price as some metaphysical, intrinsic, or natural value inherent in a thing still persists despite the fact that there is little evidence of such a practice ever existing, and that it has seldom been advocated by anyone.[10] Viewing price as a product of the metaphysical properties of a thing is fundamentally incompatible with modern economic thinking, as it is recognised today that price is a function of a variety of factors such as the

[5] See 2 6 above.
[6] See § 304 AGBG as discussed in 3 4 2 above, as well as B Eccher & O Riss in H Koziol, P Bydlinski, & R Bollenberger (eds) *ABGB Kurzkommentar* 5 ed (2017) § 304 [1].
[7] See 3 5 4 1 above.
[8] See 3 3 4. See also M Winner *Wert und Preis im Zivilrecht* (2008) 222-223.
[9] See below at 5 2 2 1; see also Barnard (2013) *THRHR* 524-525.
[10] See A Perrone "The Just Price Doctrine and Contemporary Contract Law: Some Introductory Remarks" (2014) 125 *Rivista Internazionale di Scienze Sociali* 217 222-223; SA Smith "In Defence of Substantive Unfairness" (1996) 112 *LQR* 138 142.

cost, scarcity, and demand for a certain good or service.[11] Metaphysical or intrinsic value therefore cannot serve as the guideline for a just price.[12]

5 2 1 2 Cost of production

While the market price was generally understood as the fair price, many prominent writers referred to the cost of production in determining a fair price. The Roman-Dutch writer Grotius, for example, favoured using the market price of a good as a guideline for the fair price, but also recognised that account should be taken of the labour and expenses involved in the production of a thing.[13] Thomas Aquinas, especially in his earlier work, similarly advocated for an understanding of just price that took account of the production cost of a good.[14]

It makes intuitive sense that some or other relationship should exist between the cost to produce a thing, and the cost to acquire it on the open market (i.e. its market price). This position is corroborated by standard economic theory. Under conditions of perfect competition a firm maximises profit through producing a certain good up to the point where the economic cost the firm incurs in producing one more of the good is equal to the revenue which it receives from selling it (i.e. the market price of the product).[15] In a perfectly competitive market, the market price should in theory therefore be equal to the marginal cost of production. It is therefore considered conventional knowledge that a firm cannot charge more than the cost of producing the product in a perfectly competitive market.[16]

However, while the cost of production seems promising as a guideline for the just price, it presents a number of difficulties in practice. On the demand side, prospective buyers often do not possess the necessary information or perfect rationality ascribed to them in theory, and therefore do not always respond as expected to increases or

[11] See the discussion directly below in 5 2 1 2.
[12] See Smith (1996) *LQR* 142; J Gordley "Equality in Exchange" (1981) 69 *CLR* 1587 1604-1605.
[13] See GF Lubbe "Taking Fundamental Rights Seriously" (2004) *SALJ* 395, 400.
[14] See 2 4 2 3 2 above.
[15] See P Sutherland & K Kemp *Competition Law of South* Africa (2017) 1.4.1 for an explanation of the behaviour of a single producer in a perfectly competitive market. If the market price is higher than the cost of producing one more product, then the producer will increase his profit by increasing production; see also L Kelly, D Unterhalter, I Goodman, P Smith, & P Youens *Principles of Competition Law in South Africa* (2017) 23.
[16] See YM Atamer "Why Judicial Control of Price Terms in Consumer Contracts Might Not Always Be the Right Answer – Insights from Behavioural Law and Economics" (2017) 80 *MLR* 624 627.

decreases in price.[17] More relevant for the purposes of this discussion however, the standard economic rationale is constantly challenged by monopolies, oligopolies, and all manner of firms exercising market power on the supply side.[18] A few examples from the perspective of producers should suffice to show why using only the cost of production as a measure for the fair price cannot work in practice.

Assume for example that you have a market with two producers of a generic and fully substitutable good. Due to some trade secret, Producer A is able to produce the good significantly cheaper than Producer B. If only the production cost is used as a guideline, the "fair" price of A's good would be much lower than the fair price of B's good, despite them serving exactly the same purpose. Should A therefore be forced to sell his good for cheaper, rather than allowing him to use his competitive advantage to receive a higher mark-up on the product?

What would happen if due to some external event, the demand for the product surges? If only the production cost was used as a guideline, the fair price would stay the same, as the production cost stays the same. Would both A and B be forced to keep their price low, and not be allowed to profit from the surge in demand? The late scholastics identified that such a solution was untenable in a market economy: traders should be allowed to benefit from an increase in demand, as they also carry the risk of demand for the goods collapsing.[19]

Using the cost of production as the guideline for a fair price also necessitates making value judgements about what types of costs, and what margins of profit are reasonable (and which are not).[20]

These examples all serve to illustrate suggest that making use of the production cost as the primary guideline for the fairness of a price would not be feasible or economically desirable. This does not mean there can be no role for production costs. As the cost of production is one of the input factors reflected in the market

[17] See Sutherland & Kemp *Competition Law* 1.4.1 for the theoretical assumptions and preconditions on which neo-classical price theory is built; see Atamer (2017) *MLR* 626-628 for a brief description of the theory of price formation in perfectly competitive markets (and shortcomings thereof).
[18] See Atamer (2017) *MLR* 628.
[19] See 2 4 3 2 above.
[20] Winner *Wert und Preis* 105.

price,[21] there might be circumstances where it can provide a useful guideline for what a fair price should theoretically be. It might for example be reasonable in the context of rescue at sea to look at the costs incurred by the rescuer, in addition to a modest premium (or profit), to calculate what a fair price might be. In situations of clear market failure, or where a price is strikingly disproportionate, cost of production could provide similarly valuable guidance.[22]

5 2 1 3 Subjective personal value

Another prominent approach to determining the fairness of the price refers to the value that contracting parties attach to the goods, or the welfare which they derive from it.[23] Adherents of this approach, which relies on a subjective theory of value, might argue that you cannot determine a fair price with reference to any standard external to the contracting parties:[24] "The value of all things contracted for, is measured by the appetite of the contractors: and therefore just value is that which they have consented to give."[25] Thomasius argued similarly that the price depends only on the free will of the parties,[26] and accordingly that no just price can exist outside of that agreed upon by the parties.[27] As discussed above, these arguments of Thomasius and Hobbes were considered to be persuasive by continental lawyers during the 18th and 19th century.[28] However, relying only on the subjective value the parties attach to the *merx* presents a number of practical difficulties as well.

It is impossible for a court to determine reliably what value the parties subjectively place on a good, as this information is available only to the parties themselves, and depends on their state of mind.[29] Although courts would be able to regard some claims as more probable than others, it is nearly impossible to prove conclusively, or to falsify a party's claims about the value they place on a thing. The value that parties

[21] Gordley (1981) *CLR* 1609.
[22] Winner *Wert und Preis* 105; see the discussion at 5 2 4 below.
[23] See for example IH van Loo *Vernietiging van Overeenkomsten op Grond van Laesio Enormis, Dwaling, of Misbruik van Omstandigheden* LLD Thesis, Open Universiteit (2013) 36.
[24] PS Atiyah *Essays on Contract* (1986) 347.
[25] T Hobbes *Leviathan* 1 15 quoted in Zimmermann *Obligations* 265.
[26] *De Aequitate Cerebrina* 2 15 quoted in Anhert (1997) *Ius Commune Zeitschrift für Europäische Rechtsgeschichte* 157-158.
[27] *De Aequitate Cerebrina* 2 16 quoted in Anhert (1997) *Ius Commune Zeitschrift für Europäische Rechtsgeschichte* 158.
[28] See 3 2 above.
[29] See Smith (1996) *LQR* 141.

place on a good or service might also be prone to changing easily. In cases where parties regret their decision, they would have an incentive to lie about how much they valued the *merx*.[30] This is part of the reason why Voet, like Aquinas before him, held that the value of a thing should generally not be determined with regard to the subjective value which one person places on a thing.[31]

While it therefore cannot serve as the primary guideline for a fair price, there are situations where it can arguably assist in determining whether the contract price is unfair. In Austria, the functioning of § 934 ABGB can be excluded where the disadvantaged party declares that he accepts the extraordinarily high price due to personal affection for the *merx* (*besondere Vorliebe*).[32] Aquinas also recognised that it was permissible to sell a thing for more than its worth if both parties subjectively attached a higher value to it. Consider for example a *merx* which both parties attach high sentimental value to, but the prospective buyer does more so than the seller.[33] The seller might not be willing to sell at the fair market price, while the buyer might be willing to pay much more. In this case the law should not stand in the way of parties freely and willingly making an exchange that is beneficial to both, even if it is done at a price generally considered to be unfair.

Courts should however be careful to infer from the circumstances that one of the parties purposefully overpaid. Conversely, courts should also be hesitant in accepting standard clauses to this effect too readily. Such clauses could otherwise be used to circumvent the functioning of a fair price rule, rendering it nugatory.[34]

5 2 1 4 Market price

As has been mentioned above, the market or customary price has been the basis for fair price rules historically,[35] as well as in modern times.[36] It is also the guideline advocated by many modern proponents of a fair price rule.[37] Romanists and

[30] 141.
[31] See 2 5 3 above.
[32] See 3 4 3 3 above.
[33] See 2 4 2 3 2 above; J Finnis *Aquinas: Moral, Political, and Legal Theory* (1998) 202, 206; Van Loo *Vernietiging* 36.
[34] See 5 5 2 below, see also Zimmermann *Obligations* 269.
[35] See 2 4 2 3 and especially 2 4 2 3 2 above.
[36] See 3 3 4 (Germany), 3 4 2 (Austria), and 3 5 4 2 (Louisiana) above.
[37] Smith (1996) *LQR* 141; see Gordley (1981) *CLR* 1609; P Benson "The Unity of Contract Law" in P Benson (ed) *The Theory of Contract Law* (2001) 184 185, 189-190.

scholastics in the Middle Ages did not share our nuanced understanding of market economics, and therefore used different terms to describe essentially the same phenomenon.[38] While they understood that price was a function of factors such as production cost, need and scarcity, they did not understand demand and supply as two separate functions, the intersection of which would indicate an equilibrium price. They knew therefore what factors played a role in price formation, but not how these came together to determine the price.

Lacking such a mechanism for price determination, they consequently believed that the price at which things were sold (the current or usual price) was determined by the *communis aestimatio*, the judgement of buyers and sellers as to what something is worth.[39] Once this price is determined by the judgement of the market as a whole, it becomes objective (or external) to each individual participant in the market.[40] Understood in modern economic terminology this current price is equivalent to what we understand today as the market price,[41] or more precisely the long-run equilibrium market price.[42] It will differ depending on place and time, and importantly it will fluctuate.[43] It should be noted however that the long run equilibrium market price is not necessarily a competitive market price. Every market, even a monopolistic market, can reach a long-run equilibrium.

The notion that the market price is the best guideline for determining a fair price also enjoys the benefit of familiarity. It is not only the norm internationally, which means that there is a wealth of literature and decisions available on the subject, but is also a familiar standard in South African contract law.[44] It was also used as the standard for a fair price in South African law before the abolition of the doctrine of *laesio enormis*.[45] It is therefore a term which courts are familiar with, and it is arguably also relatively easy to determine.

[38] See in this regard Gordley (1981) *CLR* 1606-1608.
[39] 1607.
[40] Zimmermann *Obligations* 265; Gordley (1981) *CLR* 1607.
[41] See W Decock *Theologians and Contract Law: The Moral Transformation of the Ius Commune (ca. 1500-1650)* (2013) 602; Perrone (2014) *Rivista Internazionale di Scienze Sociali* 220, 226.
[42] See Gordley (1981) *CLR* 1609.
[43] Smith (1996) *LQR* 142, see also for example 2 4 3 2 above.
[44] See 5 2 2 1 below.
[45] See 5 2 2 1 below.

Given these benefits, it may therefore be concluded that, at least when compared to the alternatives, the market price is indeed the most appropriate measure to establish whether a price is fair. It is not a perfect standard, however. There are times where determining the market price is very difficult if not impossible, such as where the *merx* is unique, or where no real market exists for the *merx*. A rare painting being auctioned off might serve as an example.[46] In many of these cases a fair price rule based on market price could logically not find application.[47] Using the market price also assumes that judges are able to identify the relevant market, something which has presented many challenges in the field of competition law.[48] Finally, the market price sometimes leads to unsatisfactory results where the market itself is structurally defective or non-competitive.[49] These problems will be considered below.

5 2 2 Determining the market price

In the majority of cases, determining the market price will require evidence which is relatively easy to obtain (for example the price typically paid for a certain good, or the average rental price of an apartment in the same apartment building). A similar approach was followed in South African law prior to the abolition of the doctrine of *laesio enormis*. In *Botha v Assad*,[50] for example, the court states that: “In the case of sale the justum pretium can be established by the evidence of valuers having experience of similar transactions in the neighbourhood.”

A court might also rely on evidence generally available in the market, such as the prices charged for similar goods by competitors. The more generic a product is, the easier it might therefore be to determine the market price. One could for example simply compare what a certain good or service costs at different stores to determine whether the contracting party in question paid an unfair price

But this still leaves the more difficult cases. Here a number of ways exist in which a court could go about its task. In legal systems such as Austria and France, an expert witness is used to help the court to estimate the value of the *merx*.[51] Expert

[46] See for example Smith (1996) *LQR* 142; Eidenmüller (2015) *ECLR* 224.
[47] See 3 4 2 above.
[48] See 5 2 3 below.
[49] See 5 2 4 below.
[50] 1945 TPD 1 6.
[51] See for example 3 4 2 above.

evidence is admissible in contract law disputes in South African courts, as long as the court is satisfied that the expert is sufficiently qualified.[52] Since the burden of proof rests on the party seeking to avoid the contract,[53] the risk of not being able to establish the market price lies on him, as he would need to adduce evidence regarding the fair price to show that the contract price is unfair. In this situation the role of the court is merely to determine if the evidence adduced by the party seeking avoidance is persuasive.

The standard of the "market price" of a good or service is already applied as a standard in South African law, and might therefore be a fitting and practicable guideline for establishing a fair price.

For example, South African law requires that the content of a contract should be certain, or at least ascertainable under the maxim *id certum est quod certum reddi potest* – that which can be rendered certain is certain. South African law under this approach accepts that parties can enter into an agreement to render a service at an unspecified reasonable price, although the sale of a thing at a reasonable price has been held to be void for vagueness.[54]

However, it is interesting to note that while courts consider a reasonable price to be too vague, they consider market price, by contrast, to be a certain enough standard. This is clear from the decision of the court in *Adcorp Spares PE (Pty) Ltd v Hydromulch (Pty) Ltd*,[55] which held that, where it is readily ascertainable, the market price of a thing is a standard which is in itself certain.

Apart from sales at an unspecified price, there is a variety of contexts in which courts already make use of the market price as a guideline. One example of such has already been mentioned in chapter 2. The *actio quanti minoris*, one of the aedilitian actions available in the case of latent defects or *dictum et promissum*, allows the

[52] LF van Huyssteen & CJ Maxwell *Contract Law in South Africa* 4 ed (2015) para 183; see also the quote from *Botha v Assad* 1945 TPD 1 above at 5 2 2.
[53] See 5 4 below.
[54] See LF van Huyssteen, MFB Reinecke, & GF Lubbe *Contract General Principles* 5 ed (2016) 225; JE du Plessis "Possibility and Certainty" in D Hutchinson & C-J Pretorius (eds) *The Law of Contract in South Africa* 3 ed (2017) 213 223.
[55] 1972 3 SA 663 (T) 668.

court to reduce the purchase price to the market value of the *merx*.[56] In other words the purchaser is able to claim the difference between the contract price and the market price,[57] which would of course necessitate judicial estimation of the market price of the *merx* in question.

An overview of prominent cases concerning the doctrine of *laesio enormis* before its abolition in South Africa also establishes clearly that market price was used by courts as a reference for the fair price. Already in 1875 in *Levisohn v Williams*,[58] De Villiers CJ stated that: "I am quite satisfied on the evidence that the fair marketable value of the ring is only £20, and that therefore the sale for £45 was for more than double its value …". In *Katzoff v Glaser*[59] the court, citing Voet, also approved of using the market price as the measure of the fair price. The court notes though that market value, although widely used, might not be the only test, nor is it conclusive. In *Tjollo Ateljees*,[60] Van den Heever JA stated that the contract price should be compared to the "true market value" of a thing. *Botha v Assad*[61] seems at first to be the exception to this general trend, as the court refers only to the "true rental value". It becomes clear from the judgment, however, that the court still envisions a market rental price when the court states that: "[V]aluations [of the *iustum pretium*] will ultimately rest on the supply of and demand for similar premises or articles."[62]

The concept of market price is not only found in case law, but also in the Constitution itself. Section 25 of the Constitution, which entrenches the right to property, also determines the conditions under which property may be expropriated. Section 25(2) determines that property may be expropriated only if it is in the public interest, and subject to compensation, the amount of which has to be agreed to by the parties, or if no agreement can be reached, must be decided or approved by a court. Section 25(3) determines that this amount must be just and equitable, reflecting a balance between the public interest and the interests of those affected, having regard to all the relevant circumstances including the market value of the

[56] See 3 3 3 1 above, as well the famous case of *Phame (Pty) Ltd v Paizes* 1973 3 SA 397 (A). The functioning and history of the *actio quanti minoris* are explained at 409-412.
[57] Van Huyssteen *et al Contract* 110, 141, 142.
[58] 1875 5 Buch 108.
[59] 1948 4 SA 630 (T) 636-637.
[60] See 1949 1 SA 856 (A) 868, 873.
[61] 1945 TPD 1.
[62] 7.

property. Market value is therefore expressly regarded as an indicium of reasonableness, albeit that one has to appreciate that this provision is aimed at pursuing particular policy objectives that need not apply in the contractual context.

When the abovementioned groups of cases are considered together, it becomes clear that market price is a standard which courts are well acquainted with, which is considered to be sufficiently certain, which is already used in a number of existing legal actions, and which is constitutionally mandated in others. In theory at least, courts should therefore not have a problem with using market price as a standard to judge whether the contract price is fair. Where the market price is not ascertainable, it could logically not be the guideline for the fairness of the price.

5 2 3 Determining the relevant market

Using the market price as a guideline for a fair price requires that the relevant market must be defined. The definition of the market is a central part of almost all competition law enquiries,[63] yet despite recent advances in the field of economics, the definition of the market remains challenging and at times controversial.[64]

In some cases this enquiry will not be particularly complex, as a court might, for example, simply compare the price of a certain good at a number of different retailers in a certain area. Even then the question arises, which retailers to include for example, and during which time frame the prices should be compared. The question will at other times become more complex, especially in relation to non-generic products or services where a court has to decide which products to include in this comparison.

Determining the relevant market is therefore a question which has a temporal,[65] and spatial (or geographic),[66] and product dimension.[67] The late scholastics and Roman-Dutch writers might not have shared our modern understanding of how a

[63] Kelly et al *Competition Law* 27.
[64] See WH Boshoff *Conceptual and Empirical Advances in Antitrust Market Definition with Application to South African Competition Policy* PhD Thesis in Economics, Stellenbosch University (2011) 2.
[65] Winner *Wert und Preis* 110 n 508.
[66] See Kelly et al *Competition Law* 28*;* see also Winner *Wert und Preis* 110.
[67] See generally Kelly et al *Competition Law* 27-33 on market definition.

market functions, but they similarly recognised that the *iustum pretium* of a thing depends on the time and place where the sale was concluded, as well as its quality.[68]

A court has to accord a measure of latitude with regard to the temporal and spatial dimensions, while taking into account possible reasons for fluctuations of demand and supply. Consider the example of a fir tree on Christmas day. It might reasonably be compared to the price of a fir tree a day before Christmas, but it cannot be compared to the price of a fir tree the day after Christmas, as the use of and demand for the fir trees would have plummeted. Since the value of a thing can appreciate or depreciate after the conclusion of a contract, it was recognised by both the old authorities,[69] and the contemporary systems studied in chapter 3,[70] that the value of the thing must generally be judged as it was at the time and place of contract conclusion.

Interpreting this requirement too narrowly would, however, lead to undesirable results. Consider, once again the example of rescue at sea, as discussed in the chapter 4.[71] At the exact time and place where the contract for rescue is concluded, the market consists of one buyer (the distressed party) and one seller (the rescuing party). Any price that the parties agree on would therefore constitute the market price (and consequently the fair price). How much latitude should be accorded may ultimately be a matter for expert evidence, rather than a determination of law.

The third dimension of market determination, which relates to the question of which goods to include in the market is generally the most important yet challenging dimension. In most cases the contract price of one thing can simply be compared to the price at which the same product is readily sold on the market. For example, comparing the price of a specific brand of premium German automobile parts at one retailer to the price at which it is sold at others is a relatively simple task.[72] However, the broader the product market is defined, the more difficult it becomes. Should less expensive or generic replacement parts be included in this comparison as well? Or should the enquiry go one step further and compare the price to that of equivalent

[68] See 2 4 3 2 and 2 5 3 above; see also *Commentarius ad Pandectas* 18 5 7.
[69] See for example Voet in *Commentarius ad Pandectas* 18 5 7.
[70] See for example the position in Austria at 3 4 3, and Louisiana at 3 5 4 4 above.
[71] See 4 4 2 above.
[72] Winner *Wert und Preis* 111 makes the same point using a different product. The analysis here follows the analysis provided in that example.

parts for other automobiles? If a very narrow view of the market is taken where only premium German automobile parts are included, this will result in a much higher market price. If a broad view is taken where generic substitutes are included, the market price will in this case be much lower. This reflects the general trend where the narrower the market is defined the higher the "market price" it usually results in.[73]

The most important consideration in this regards should be whether two different products are close substitutes for each other.[74] If consumers regard goods or services as substitutes for one another, in the sense that they are theoretically willing and able to switch between them, then these goods should generally be considered to fall in the same market.[75] Winner argues similarly that for the price of goods or services to be comparable, the most important consideration should be that they are substantially equivalent for satisfying a certain need in the eyes of the average informed contracting party.[76] In many cases such as with fungibles and generic goods (especially consumer goods), products will often be almost perfect substitutes.

As stated above the definition of the relevant market is a central part of almost all competition law enquiries in South Africa.[77] While the Competition Act 89 of 1998 does not provide formal guidelines or principles that should be applied to define the market,[78] a number of analytical and empirical approaches have developed in practice which might be used in difficult cases to assist the court in determining the relevant market. The most prominent of these both locally and internationally is the hypothetical monopolist or SSNIP[79] test, which inquires what effect an increase in the price of a product has on the demand for it.[80] The dominant approach to market definition in South African competition law thus focuses on the demand-side substitutability of the good.[81]

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[73] Winner *Wert und Preis* 111.
[74] See 113.
[75] See Kelly et al *Competition Law* 28.
[76] See Winner *Wert und Preis* 112.
[77] Kelly et al *Competition Law* 27.
[78] See Boshoff *Market* Definition 8; Kelly et al *Competition Law* 27.
[79] A small but significant non-transitory increase in price.
[80] See Boshoff *Market Definition* 5-6 for a description of the origins and functioning of the test; see also Sutherland & Kemp *Competition Law* 7.7.4.2.
[81] See Boshoff *Market Definition* 9; see also the definition of "goods or services" in s 1(vii) of the Competition Act.

In our context this approach could for example be used to determine if an increase in the price of one product would lead to consumers purchasing more of another product. If this is the case, then these products are arguably functional substitutes in the eyes of consumers, and therefore form part of the same market.

Where different products have substantially different properties, however, they will not form part of the same market.[82] So for example: while the different varieties of flight tickets available within economy class serve roughly the same function, they have different properties with regards to comfort, expedience, and the flexibility which they allow the traveller. Therefore one might say that they do not form part of the same market.[83] Even the prestige associated with a certain product might be a relevant characteristic in this case.[84] Prestige in the view of the contracting parties might for example explain why consumers are willing to pay exorbitant amounts of money for electronic products, such as cellular phones or tablets of a certain brand, while they could buy materially similar, if somewhat less prestigious, products for much cheaper.

5 2 4 The limits of market price

When a market is structurally defective, such as where the market is dominated by a monopolist, a fair price rule based on market price can only provide limited assistance to disadvantaged parties.[85] Since the monopolist determines the market price, any price that he charges, no matter how high, would theoretically be the market price, and therefore the fair price.[86] It makes little sense in these circumstances to make use of the market price as a guideline for fairness. On one level this poses the question what should be used as a guideline for the fair price in the absence of a competitive market price? Should a court in these cases simply make use of one of the other measures discussed above, such as the cost of production? On another level it can be asked whether a fair price rule should play a role at all when it comes to uncompetitive markets. Would it not be better if uncompetitive markets were regulated through competition law?

[82] See Winner *Wert und Preis* 112.
[83] 112.
[84] 112.
[85] 118.
[86] See Smith (1996) *LQR* 142.

The promotion of competitive market conditions and the prevention of the abuse of dominance are more typically seen as objects or aims of competition law.[87] Specialised courts and well-resourced competition authorities are arguably better equipped to handle such issues, as opposed to actions brought by individuals based on a fair price rule. *Prima facie* the answer to the second question above would therefore be that a fair price rule should not play a role when it comes to uncompetitive markets.

However, it is clear that a monopolist (or oligarch) intentionally exploits contracting parties by abusing his dominant position to charge an unfair price. Why then should inequality in exchange caused by the exploitation of monopoly power be treated any differently to other forms of inequality in exchange caused by exploitation of weakness?[88] Is there any reason why the respective remedies in competition and contract law should be mutually exclusive? In cases where the market is uncompetitive (in part due to the shortcomings of the competition authorities), why should the disadvantaged contracting party be denied a remedy, and the monopolist afforded such a privileged position?[89] This argument is all the more cogent since the prohibition of excessive pricing is rarely applied in South African competition law,[90] due to the complex and technical nature of the enquiry.[91] And why can there be no role for private law, if it can help achieve the goals of competition law?[92]

5 2 4 1 Excessive price in South African competition law

In South Africa, limited statutory control of price already exists in the abuse of dominance provisions of the Competition Act. Section 8(a) of the Act prohibits a "dominant firm" from charging an "excessive price" to the detriment of consumers. An excessive price is defined in section 1(ix) of the Act as a price for a good or service which (aa) bears no reasonable relation to the economic value of that good or service; and (bb) is higher than the value referred to in subparagraph (a).

[87] See for example Sutherland & Kemp *Competition Law* 1.10; Kelly et al *Competition Law* 2-5.
[88] Winner *Wert und Preis* 119.
[89] 119.
[90] See Sutherland & Kemp *Competition Law* 7.9.1.
[91] RD McKerrow "Excessive Pricing in South African Competition Law: Elucidating the Nature and Implications of the Consumer-Detriment Requirement" (2017) 29 *SA Mercantile LJ* 173 176.
[92] Winner *Wert und Preis* 119.

While the Act includes no definition of "economic value", the Competition Appeal Court stated in *Mittal Steel South Africa Limited v Harmony Gold Mining Company Limited*[93] that "[w]hat the legislature must be taken to have intended by 'economic value' is the notional price of the good or service under assumed conditions of long-run competitive equilibrium."

To determine whether a given price is an "excessive price", a court therefore needs to construct a hypothetical market in order to simulate competitive market conditions, and through economic analysis attempt to determine what the notional long-run equilibrium price would have been in this competitive market in order to determine the economic value of the *merx* in question. This factual enquiry thus presents the competition authorities with a number of extremely complex and technical economic questions.[94]

Once the factual enquiry is complete, the court then needs to make a value judgement as to whether this difference in price between the actual and notional long-run competitive equilibrium price is reasonable.[95] According to some writers, this value judgement is similarly problematic to the factual enquiry.[96] Finally, a value judgement needs to be made as to whether the charging of an excessive price is to the detriment of the consumer.[97]

This enquiry is further complicated by the fact that section 8(a) of the Act only applies to firms that qualify as "dominant firms" in terms of section 7 of the Act, which therefore necessitates another factual enquiry. [98]

A number of important differences therefore exist between a fair price rule based on market price, and the excessive price enquiry in terms of the Competition Act. The most important difference between these two inquiries is arguably the fact that the latter uses the notional long-run competitive equilibrium price as a guideline for a fair

[93] (70/CAC/Apr07) 2009 ZACAC 1 (29 May 2009) para 40.
[94] See McKerrow (2017) *SA Mercantile LJ* 175-176.
[95] *Mittal Steel South Africa Limited v Harmony Gold Mining Company Limited* (70/CAC/Apr07) 2009 ZACAC 1 (29 May 2009) para 32.
[96] See McKerrow (2017) *SA Mercantile LJ* 176.
[97] *Mittal Steel South Africa Limited v Harmony Gold Mining Company Limited* (70/CAC/Apr07) 2009 ZACAC 1 (29 May 2009) para 32; see in this regard generally McKerrow (2017) *SA Mercantile LJ* 189-196.
[98] McKerrow (2017) *SA Mercantile LJ* 176.

price, while the former looks at actual prices in the market. Although notional long-run competitive equilibrium price is arguably a more accurate guideline, which is able to work in structurally-defective markets as well, it is also a far more complex enquiry for a court to use, as opposed to simply comparing the contract price to other actual prices in the market.

However, it could be argued that regular courts (as opposed to competition authorities) simply do not have the necessary resources and technical expertise to determine what the fair price would be.[99]

Allowing a court to diverge from using the market price as the guideline for a fair price also poses the danger that courts will intervene too readily where they perceive a market to be non-competitive. While the theory of perfect competition present us with a good theoretical model for understanding market structure, markets are very rarely, if ever, perfectly competitive in the real world.[100] If a court is able to intervene in every dysfunctional market, it might lead to too much intervention. The goal of a fair price rule should not be that the courts become price commissars,[101] where it is assumed that the courts are better able to calculate the fair price in every contract.[102]

This begs the question in which circumstances a court should be able to divert from the market price where there is market failure, and if so what guideline they should use for the fair price in the absence of a market price?

5 2 4 2 The approach of German courts to defective credit markets

The approach which the German courts take to the regulation of consumer credit financial institutions (referred to as *Teilzahlungsbanken*) can provide some interesting insights in this regard.

These *Teilzahlungsbanken* predominantly serve a specific sector of the credit industry for short and medium term consumer loans, often serving clientele who are

[99] See for an example of the argument that normal courts do not have the necessary expertise and capacity: T Naudé "Section 48" in T Naudé and S Eiselen (eds) *Commentary on the Consumer Protection Act* (RS 2 2017) para 8; T Naudé "Introduction to ss 48-52 and reg 44: Structure and Purpose" in *Commentary on the CPA* (RS 2 2017) para 5.
[100] See Kelly et al *Competition Law* 26.
[101] See C-W Canaris "Wandlungen des Schuldvertragsrechts – Tendenzen zu seiner 'Materialisierung'" (2000) 200 *ACP* 273 303-304
[102] See the discussion in Naudé "Section 48" in *Commentary on the CPA* para 8.

not able to acquire credit at traditional financial institutions.[103] Because of the cost structure and risk profile of such credit agreements, the cost of credit at these institutions is usually higher than at a normal bank.[104]

When assessing whether the interest rate in credit agreements concluded with these institutions is fair, German courts have in the past taken the view that they do not need to compare the contract interest rate to the market interest rate offered by other *Teilzahlungsbanken*, but could instead compare it to the commercial interest rate for the banking sector as a whole, as designated by the German *Bundesbank* (central bank), plus the typical fees and service costs associated with such credit agreements.[105]

In terms of the determination of the relevant market, the court in question chose not to view the market for consumer credit as a special or separate market. It was argued that since these *Teilzahlungsbanken* do not serve exclusively a clientele which are not creditworthy, they compete, at least in principle, with traditional financial institutions.[106]

In terms of the determination of what constitutes a fair price, the court chose not to use the market interest rate for consumer credit as a guideline for a fair interest rate, but chose instead to calculate what they consider a fair interest rate. One could argue that the market for consumer credit was in this case structurally exploitative. Parties who were in a weak bargaining position (due to being unable to access credit at a traditional financial institution) were exploited through being charged higher interest rates in these credit agreements. Comparing the contract interest rate to other exploitative interest rates to determine its fairness would be futile – one exploitative rate being compared to another does not give you a better idea of what is fair to begin with. The court stated that in the assessment of fairness it is necessary to look at all the relevant circumstances and that it should therefore also take into account

[103] See BGH, BGHZ 80, 153 at II.4.a.
[104] 153 at II.3.a-b.
[105] See BGH, BGHZ 80, 153 at II.4.a; Winner *Wert und Preis* 225.
[106] Winner *Wert und Preis* 225.

major price setting factors in the market for credit (in this case the commercial interest rate for the banking sector) as opposed to just the market price.[107]

The decision of the court in this matter might provide a template for the type of situation in which a court could deviate from using the market price as the guideline for a fair price. In this case it was clear that the agreements were exploitative, and it was relatively simple for the court to calculate what a non-exploitative/competitive interest rate would be, as this was based on a measure that is objectively determinable and publicly available (the commercial interest rate).

This example suggests that courts should be invested with the discretion to deviate from using the market price as a guideline for the fair price, but only in exceptional circumstances; typically those where it is clear that the market is defective and that using the market price will therefore only lead to further injustice, and where the court has the capacity and means to determine what a fair price would be with relative ease.

For this determination a court could make use of the measures such as the cost of production, taking into account all of the practical challenges and limitations associated with this approach as outline above.[108] Another approach would be to compare the price, and the margins achieved by the contracting parties, to the conduct of similar firms in comparable spatial or product markets; taking into account reasons why prices might be different in two markets.[109] It needs to be emphasized, however, that such discretion should be used sparingly and cautiously.[110]

5 3 Calculating disproportion

The discussion thus far has focused on what measure the contract price should be compared to in order to ascertain whether it is unfair. While the general conclusion has been reached that the market price of a good or service is the best indication for what should be considered the fair price, this still gives us little idea of when exactly a contract price should be considered unfair. This section attempts to answer two

[107] See also BGH, BGHZ 80, 153 at II.3.b.
[108] See generally also Winner *Wert und Preis* 129-133 on the challenges of using the cost of production as a guideline for the fair price.
[109] 135.
[110] See F Bydlinski *Juristische Methodenlehre und Rechtsbegriff* 2 ed (1991) 360.

questions in this regard. What divergence between the contract and the market price justifies the court concluding that the contract price is unfair, and should such an objective discrepancy be enough by itself for the contract to be set aside?

5 3 1 Should a fixed or flexible threshold be used to determine whether price is fair?

Traditionally the doctrine of *laesio enormis* made use of a fixed ratio or discrepancy between the market price and the contract price in order to determine whether the contract price was fair. If the contract price was more than twice the market price, the prejudice suffered by the disadvantaged party (measured by the difference between the contract and market price) was considered large enough that the contract could be invalidated solely on that basis, hence the term *laesio enormis,* literally a large harm. Whereas the doctrine of *laesio enormis* survived in this form into some legal systems, others apply a more flexible fair price rule.[111]

In systems where the doctrine of *laesio enormis* was codified into modern law, such as France, Louisiana, and Austria, its basic functioning has remained largely unchanged from the Middle Ages. It relies only on gross discrepancy to determine whether the contract price is fair, and it measures discrepancy between the respective performances with a fixed ratio or threshold. Why these legal systems choose to maintain the remedy in its traditional form, despite its apparent flaws, is in itself an interesting question.[112]

In legal systems that adopted or developed a modern fair price rule, such as Germany,[113] Switzerland,[114] and Italy,[115] as well as in the international model rules,[116] contracts can generally only be invalidated if the gross discrepancy in the value of performances is accompanied by evidence of some procedural defect. A flexible approach is used to determine discrepancy, which does not require a specific ratio

[111] For an overview of the different approaches see T Finkenauer "Laesio Enormis" in J Basedow, KJ Hopt, R Zimmermann, & A Stier (eds) *The Max Planck Encyclopedia of European Private Law* II (2012) 1029 1030, 1031.
[112] See the discussion at 3 5 5 above in relation to Louisiana.
[113] See 3 3 3 1 above.
[114] See briefly M Armgardt "Zur Dogmengeschichte der *Laesio Enormis* - Eine Historische und Rechtsvergleichende Betrachtung" in K Riesenhuber & IK Karakostas (eds) *Inhaltskontrolle in Nationalen und Europäischen Privatrecht* (2009) 3 13-14.
[115] A Somma in L Antonelli & A Veneziano (eds) *Principles of European Contract Law and Italian Law* (2005) Art 4:109 [1].
[116] See 3 7 2 above for the model rules.

between the market price and the contract price. In Germany for example, unfairness is determined by the courts on a case-by-case basis.[117] Since courts have historically been strongly influenced by the doctrine of *laesio enormis*, they often make use of the traditional ratio of 2:1 between the contract price and the market price as a guideline when determining whether a price is fair, but they are in no way bound by it.[118]

As stated above, these modern fair price rules go beyond simple price scrutiny, and instead require evidence of some or other defect in the bargaining process.[119] In Germany, for example, this defect entails the exploitation of the circumstances of weakness of a disadvantaged party. This procedural defect is often referred to as the subjective requirement, as opposed to the disproportion itself, which is considered the objective requirement. In a similar fashion some consumer law regimes such as the Unfair Contract Terms Directive[120] impose aspects of procedural fairness, such as inquiring whether the contract terms were individually negotiated, and whether the terms in question were transparent, as part of fairness review.[121]

We are therefore confronted with a series of interrelated questions in attempting to choose the most appropriate fair price rule. The first question is whether an approach that makes use only of objective discrepancy, or an approach which requires a procedural defect in addition to the objective discrepancy, is to be preferred. Since both these approaches make use of objective discrepancy, the question is then raised whether there should be a fixed or flexible threshold, beyond which the objective discrepancy between the contract price and the market price, is considered unfair.

These questions are interrelated because the answer to one might affect the answer to the other. Fair price rules that make use of only gross disparity seem to prefer fixed thresholds that are generally higher. By contrast fair price rules that require evidence of some procedural defect in addition to the gross discrepancy

[117] See Zimmermann *Obligations* 176; see also 3 3 4 above.
[118] Van Loo *Vernietiging* 269.
[119] See Eidenmüller (2015) *ERCL* 221.
[120] Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts.
[121] This was briefly discussed above at 3 7 5.

seem far more willing to use a flexible and generally lower threshold for the determination of the objective discrepancy.

This is illustrated particularly well in the Austrian legal system, which contains no less than two fair price rules. The doctrine of *laesio enormis* in § 934 ABGB, based only on objective discrepancy, requires a disproportion of 2:1 between the contract price and the market price. By contrast, § 879 (2)4 ABGB, which declares *contra bonos mores* grossly disproportionate contracts that are concluded through the exploitation of the strained financial situation, lack of experience, or excited state of mind of the disadvantaged party, contains no fixed threshold. This provision generally requires a smaller disparity in the values of the respective performances than the doctrine of *laesio enormis* contained in § 934 ABGB.[122]

Making use exclusively of objective discrepancy in the value of performances has the advantage that it is simpler and more mechanical to apply, and might therefore lead to less legal and commercial uncertainty. Assuming that the market price is certain and stable, parties are able to determine with relative ease whether they run the risk of the contract being invalidated on the basis of the price being unfair. The simple and rigid nature of such an approach can, however, also lead to undesirable results, and it is not without practical problems. Particularly vexing is the question of what exactly the threshold should be for a discrepancy to be classified as unfair.

When considering what the ideal threshold should be, there is unfortunately little empirical evidence to guide us. When a fixed threshold is required, whether it is one half, two-thirds, or five-twelfths of the market price of the good, it will inevitably lead to some arbitrary results.[123] Yet, this question has important consequences. A threshold that allows (too) great discrepancy between the contract price and the fair price would deny the remedy to many prejudiced contracting parties. By contrast, a threshold that allows only marginal discrepancy would inadvertently lead to (too) many validly-concluded contracts being invalidated.

The rigid nature of a fixed ratio approach is arguably unsuited to achieving a fair result in some cases, as it denies the court the ability to treat unlike cases

[122] See R Bollenberger in *Kurzkommentar* § 879 [18].
[123] See Zimmermann *Obligations* 264.

differently[124] through taking individualising factors into account.[125] In *Botha v Assad,*[126] the court noted for example that the doctrine of *laesio enormis*, "resting as it does upon an arbitrary mathematical formula … appears to be crude and wanting in the elasticity requisite if equitable results are to be achieved." An approach which allows for no discretion heightens the risk of injustice in individual cases,[127] and might deprive the court of the ability to develop the common law in an incidental manner to achieve equitable goals.[128]

A flexible approach by contrast provides the court with more discretion to determine whether the objective discrepancy is unfair, taking into account a host of considerations. Some might argue that too much judicial discretion is undesirable, as it will allow judges to strike down contracts based on nothing more than their idiosyncratic sense of justice.[129]

As Lubbe has argued, however, the perception that elasticity and flexibility based on open norms should be restricted in judicial decision-making is misconceived, especially in matters of public policy.[130] By their very nature, decisions in matters of public policy involve open-ended value-judgements, which should be made in line with recognised principles and policy considerations.[131] A price that is unfair in a given context might be fair in another. So for example courts in Germany treat commercial parties and consumers differently when considering whether a price is fair; the threshold across which the objective discrepancy is considered unfair is much lower in relation to consumers than with commercial parties.[132]

It is also evident that disadvantage can be expressed in ways other than just the relationship between contract price and market price. The flexible approach used in

[124] See for example Lubbe (2004) *SALJ* 417.
[125] Ackermann & Franck "Validity" in *European Contract Law* 215.
[126] 1945 TPD 1 4.
[127] See Lubbe (2004) *SALJ* 417.
[128] 417.
[129] See for example G Lubbe "Bona Fides, Billikheid en Openbare Belang" (1990) 1 *Stell LR* 1 15, who notes that the idea that judges should not exercise their discretion in an idiosyncratic or intuitive manner, seems to be a dominating theme in jurisprudence on public policy; see also for example M Wallis "The Common Law's Cool Ideas for Dealing with Ms Hubbard" (2015) 132 *SALJ* 940 958-959 who argues that it would be incompatible with the rule of law if each case were subject to the notions of fairness of the individual judge.
[130] Lubbe (2004) *SALJ* 417.
[131] 418.
[132] See 3 3 4 above; Ackermann & Franck "Validity" in *European Contract Law* 215.

Germany has allowed courts to investigate for example not only the relationship between the contract and market price, but also to relate the prejudice to other yardsticks, such as the average monthly income, or the financial means of the prejudiced party.[133] Another consideration might be the nature of the *merx*, especially in cases where parties contract in respect of basic needs, such as housing, education, and healthcare.[134]

It has been noted in the German context that general provisions such as § 138 (1) BGB have served as gateways for constitutional values, and especially for the protection of fundamental rights.[135] If a South African court were to follow the flexible German approach, it could find for example that a price is unfair, even if the discrepancy between the market and contract price is not that great, if the prejudice suffered by the disadvantaged party was very great in relation to his meagre income, or if he was contracting to meet a basic need or right. This would give a very direct entry point for equitable considerations and constitutional rights. Such a role cannot be fulfilled if a fixed threshold is used. These considerations would suggest that a flexible threshold for objective disparity might be more appropriate generally, and especially in the South African context.

It can also be argued that if a more flexible approach is used, where the relationship between market price and contract price is not the only deciding factor (as was traditionally the case with the fixed threshold approach followed by the doctrine of *laesio enormis*), then neither the determination of the relevant market, nor the market price, need to be as precise.[136] When a judge is invested with the discretion to take a host of factors into account, it is not as centrally important whether the contract price is 1.9 or 2.1 times the market price.

5 3 2 Is objective disproportion enough, or should there be a procedural defect as well?

The preceding analysis suggests that, on balance, a flexible threshold for objective disparity may be preferable to a rigid one. It was further pointed out that jurisdictions

[133] See 3 3 4 above; Van Loo *Vernietiging* 270.
[134] See Lubbe (2004) *SALJ* 422 for a similar argument.
[135] Ackermann & Franck “Validity” in *European Contract Law* 214.
[136] Van Loo *Vernietiging* 272, argues in a similar fashion that it is for this reason that German courts have no trouble applying § 138 BGB to contracts involving an element of chance.

that make use of such a flexible threshold usually require that the disparity should be accompanied by evidence of some procedural defect. In this regard it is noticeable that whereas some similarity generally exists between the different legal systems in the approach to measuring objective disparity between the value of the respective performances, the nature of the procedural defect required differs greatly.

The inclusive approach followed by the Article 4:109 PECL might be said to reflect best the prevailing view in contract law systems in Europe.[137] It requires, in addition to objective disparity, that the disadvantaged party was either dependent on or had a relationship of trust with the advantaged party, was in economic distress or had urgent needs, was improvident, ignorant, inexperienced or lacking in bargaining skill. Many of these grounds are not recognised as independent procedural defects in South African contract law. This is indeed the point: if some independent procedural defect were required when applying a fair price rule, it would just beg the question why the contract should not be avoided on the basis of that procedural defect in the first place. These should therefore be considered lesser forms of procedural defects, which are only material enough to avoid the contract where they are accompanied by some evidence that they were exploited to the gross disadvantage of one of the contracting parties.[138]

5 3 2 1 Procedural defects as a justification for providing relief

It is a core tenet of freedom of contract, especially from the perspective of autonomy-based will theories of contract, that contracting parties should be free to choose on what terms they wish to contract.[139] Rules of contract law which require the enforcement of contracts, such as the maxim *pacta sunt servanda*, exist in this view to give expression to the private autonomy of contracting parties.[140] It is assumed that contracting parties know what is in their best interest, and that they are therefore best positioned to decide whether a certain price is fair or not.[141]

[137] See for example Eidenmüller (2015) *ERCL* 221; Finkenauer in *Max Planck Encyclopedia* 1031.
[138] See for example Bollenberger in *Kurzkommentar* § 879 [19] who makes a similar comment regarding the criteria of § 879 (2)4 ABGB.
[139] See Van Huyssteen *et al Contract* 10, 11,
[140] Lubbe (1990) *Stell LR* 15.
[141] See Eidenmüller (2015) *ERCL* 221.

However, when the decision-making capacity of contracting parties is impaired through the presence of some procedural defect, the contract arguably cannot be seen as a true expression of their autonomy. Moreover, requiring evidence of some procedural defect allows us to assert with a greater certainty that the contract is likely to be inefficient, in the sense that it is concluded under circumstances where one of the parties likely acted against their best interest.[142]

Requiring evidence of some procedural defect thus helps explain why relief is provided in these cases: it is not merely given because of the disproportion, but rather because this disproportion is the result of the intentional or negligent exploitation of the circumstances of weakness of the disadvantaged party.[143] Requiring evidence of some form of procedural defect as part of the enquiry into whether relief should be provided therefore seems sensible from a dogmatic or theoretical perspective.

5 3 2 2 Procedural defects as a method to limit abuse of a fair price rule

Requiring that some procedural defect be present arguably serves an important gatekeeper function in order to limit abuse of fair price rules by denying the remedy to parties who were in a strong enough position to look after their own interest. If contracting parties are considered for reasons of autonomy and economic efficiency to be best suited to choose the terms of the contract,[144] contract law should encourage them to do so. It is therefore undesirable that the court needs to step in to protect parties where there is no apparent reason why they were not able to look after their own interests when concluding the contract.[145] It is therefore pertinent that courts ask, as part of this procedural enquiry, what disadvantaged parties could have done to protect themselves.[146] Where contracting parties where in a strong bargaining position, yet still chose to enter into the disadvantageous contract, courts should be more hesitant to provide relief.

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[142] 226-227.
[143] See Gordley (1981) *CLR* 1631.
[144] See for example O Lando & H Beale *Principles of European Contract Law I & II* (2000) Art 4:109 Comment A.
[145] See Art 4:109 PECL Comment B.
[146] See Gordley (1981) *CLR* 1629-1630.

A similar consideration is present in German law, where the procedural dimension of the enquiry under § 138 (1) BGB[147] allows a court to deny the remedy where it is clear that disadvantaged contracting parties were in a strong enough position to protect themselves. German courts have found, for example, that a contract price is not unfair, even where the disadvantaged contracting party proved that the contract price was two and a half times higher than the market price.[148] The court ruled in the case in question that it was entirely possible for the disadvantaged party, as a businessman, to evaluate the benefits and disadvantages of the transaction. Since he nevertheless chose not to exercise his proper judgement and still entered into the transaction for speculative reasons, the court was not prepared to infer that he was exploited in any way.

§ 935 ABGB arguably excludes the application of § 934 ABGB where the disadvantaged party knew the true value of the *merx*, and nevertheless entered into the contract at the prejudicial price, for the same reason. As Austrian contract law deals with the abuse of circumstances in a separate provision,[149] the doctrine of *laesio enormis* functions primarily in Austria as a remedy protecting parties who err or are ignorant with regards to the value of the *merx*.[150] Therefore, when contracting parties know the value of the *merx* and nevertheless enter into the contract, a court could not allow them to escape the contract on that basis as this would allow contracting parties to abuse the remedy to escape validly concluded contracts.

5 3 2 3 A trend towards an approach based predominantly on objective disparity?

Although these procedural requirements are arguably an important component of the fair price rule for both the dogmatic and pragmatic reasons as set out above, there seems to be a tendency or shift in European contract law (and especially in consumer law) towards fair price rules based predominantly on objective disparity.[151] In chapter 3 the examples of the Unfair Contract Terms Directive, and the CESL were discussed briefly.[152] In relation to the former it was argued that the strict interpretation of the transparency requirements contained in the directive by the ECJ has in effect

[147] See 3 3 3 and 3 3 4 above.
[148] BGH, NJW-RR 1998, 1065.
[149] See § 879 ABGB.
[150] See Van Loo *Vernietiging* 211.
[151] See also Finkenauer in *Max Planck Encyclopedia* 1031.
[152] See 3 7 5 above.

lead thereto that all non-negotiated terms (including price terms) which result in a significant imbalance in the rights and obligations of the parties could be set aside by the court.[153] In relation to the CESL it was argued that the willingness of the European Parliament to adopt amendments with the intention of extended fairness control to the adequacy of price might signal a change in approach to judicial control of price.[154]

In relation to national law within the EU, the elevation of the doctrine of *laesio enormis* to mandatory law for consumer contracts in Austria might serve as the clearest example of a readiness to regulate the fairness of price.[155] Although the change did not occur as expressly (or intentionally) in Germany as it did in Austria, the clear majority of German writers also seem to agree that German law is moving towards the position where objective disparity in the value of performances is by itself enough for a contract to be set aside by the court.[156] It remains to be seen however, whether these examples are really indicative of a trend towards an approach based on objective disparity.

5 4 The burden of proof

The general rule in South African law, and indeed many other jurisdictions, is that the party alleging that the contract is illegal bears the burden of proof in the dispute. In this way, effect is given to the value of *pacta sunt servanda*: ostensibly valid contracts must be enforced.[157] In the jurisdictions studied in chapter 3, a similar approach is revealed in relation to the respective fair price rules. In all of these cases, the burden of proof of unfairness rests on the party seeking rescission of the contract through alleging that the contract is illegal and ultimately invalid due to such unfairness.[158] In decisions before the abolition of the doctrine of *laesio enormis* in

[153] See 3 7 5 1 above.
[154] See 3 7 5 2 above.
[155] See 3 4 2 above.
[156] See Kötz *Contract Law* 194; Zimmermann *Obligations* 269; Gordley (1981) *CLR* 1631, 1648-1649; This is discussed at length above at 3 3 3 3; for more examples of writers agreeing with this view see Armgardt "Laesio Enormis" in *Inhaltskontrolle* 13; BS Markesinis, H Unberath, & A Johnston *The German Law of Contract: A Comparative Treatise* 2 ed (2006) 254.
[157] See JE du Plessis "Illegal Contracts and the Burden of Proof" (2015) 132 *SALJ* 664 668-669.
[158] This is discussed explicitly at 3 5 4 2 and 3 4 2 above in relation to Louisiana and Austria respectively; the same is true in Germany in relation to § 138 (1) BGB; see 3 3 3 above as well as Du Plessis (2015) *SALJ* 669. This was also the position with regard to *laesio enormis* in the Roman-Dutch law, see 2 5 2 3 above.

South Africa, courts also favoured locating the burden of proof on the party trying to escape the contract.[159] Placing the burden of proof on the party seeking to escape the contract arguably plays an important role to reduce the likelihood of excessive intervention.[160]

However, some systems have modified the application of the general rule under certain circumstances in order to assist the party alleging illegality. So, for example, German courts regularly infer that the subjective requirement of a reprehensible character is met once the gross disparity is proven.[161] Similarly, an advantaged party raising an exception to the application of § 934 ABGB, bears the burden of proving that the prejudiced party knew the true value of the *merx*.[162] An analogy might also be drawn to case of presumed undue influence in English law. In general the burden of proof rests on the party trying to escape the contract. However, if they are able to show that the contract in question "calls for explanation" an evidential presumption arises that the contract was concluded due to undue influence. If this presumption is not rebutted by the advantaged party, the contract may be set aside.[163]

A tendency is therefore apparent from the systems studied in that the burden of proof generally lies on the party alleging illegality, but that this party is sometimes assisted by special presumptions once they have proven that the contract was substantively imbalanced.

In relation to fair price rules that require a procedural defect in addition to objective disparity, it might therefore be reasonable to hold that once the disadvantaged party has proven a gross disparity between the contract price and market price, a presumption should arise that this was caused by abuse of their position of weakness. Such a presumption would play a role to assist disadvantaged parties, especially structurally weaker parties such as consumers, in meeting the abovementioned burden of proof.

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[159] See for example *Mcgee v Mignon* 1903 TS 89 98; *Katzoff v Glaser* 1948 4 SA 630 (T) 636 citing Voet *Commentarius ad Pandectas* 18 5 7.
[160] Perrone (2014) *Rivista Internazionale di Scienze Sociali* 227; see 3 5 4 2 above.
[161] Du Plessis (2015) *SALJ* 669.
[162] See 3 4 3 4 above.
[163] See HG Beale "Duress and Undue Influence" in HG Beale (ed) *Chitty on Contracts* I (2015) 749 [8-001] [8-057] – [8-062]; Smith (1996) *LQR* 146; see also 3 6 4 above.

5 5 The scope of application of the fair price rule

A number of situations exist where it might be undesirable, or impractical for fair price rules to find application. In chapter 3, it was noted for example that the application of § 934 ABGB is excluded in relation to contracts involving an element of chance, or contracts which are gratuitous in nature.[164] It was also noted in chapter 2, that many differences in opinion existed between scholars of Roman and Roman-Dutch law as to the proper scope of application of the doctrine of *laesio enormis*.[165] A few of the more contentious examples of situations where it might be desirable that fair price rules do not find application are briefly discussed below.

5 5 1 Market price cannot be ascertained

A fair price rule could logically not be applied in cases where the value (or market price) of a performance cannot, or can no longer, be ascertained. An example of such a situation might be a unique good, for which no true market exists.[166] Another example might be if a non-generic *merx* is destroyed, and it therefore is impossible to estimate its value. Where no real market price can be determined, there is nothing against which the contract price can be measured for fairness. In such cases fair price rules can do little to assist parties seeking to escape a contract.

5 5 2 Donations

A fair price rule also cannot find application where contracts are partially or wholly gratuitous.[167] By their nature donations are not intended to be exchanges of equal value. It would be illogical if a fair price rule could be used to invalidate donations where the donor later regrets making the donation.

However, courts should refrain from granting any power to standard contractual clauses which declare any amount paid or received in excess of a fair price to be a

[164] See 3 4 3 1 & 3 4 3 2 above.
[165] See for example 2 5 2.
[166] See Smith (1996) *LQR* 142; see also 3 4 3 above.
[167] As is indeed the case in Austria (3 4 3 2) and Louisiana (3 5 4 4); see also the position in the *ius commune* at 2 5 1 above.

donation, as such clauses could otherwise be used to circumvent the functioning of the rule.[168]

Courts in both Austria and Louisiana seem to be hesitant to conclude any amount in excess of the fair price should be considered a donation. A cautious approach in this regard is to be commended.[169] Courts should consider the facts and circumstances surrounding the conclusion of the contract to determine if an intention to make a donation was apparent.[170] In cases where such an intention is clear, the remedy should not be applied.

5 5 3 Contractual exemption of the remedy

The late scholastics recognised that the same weakness which compels a party to conclude a contract at a disadvantageous price could simply be used by the stronger party to insert a term into the contract expressly excluding the application of the remedy.[171] The experience in Austria has similarly shown that allowing the contractual exclusion of a fair price rules rather unsurprisingly leads to the remedy being excluded in all standard term contracts.[172] The remedy therefore cannot be excluded to the detriment of the consumer in Austria,[173] and Article 2589 of the Lousiana Civil Code similarly determines that a party can invoke the remedy of lesion beyond moiety even if he has explicitly renounced it.[174] Neither can any of the respective remedies found the model rules studied be excluded.[175] The inevitable conclusion is therefore that the contractual exception of fair price rules should not be possible.

5 5 4 Contracts involving an element of chance

Contracts involving an element of chance, such as annuities, have historically also been excluded from the operation of the doctrine of *laesio enormis*.[176] In more

[168] See 3 4 3 2 above.
[169] See 3 5 4 3 and 3 4 3 2 above.
[170] See the discussion on Austrian law above at 3 4 3 2.
[171] See Decock *Theologians* 590; J Gordley *The Philosophical Origins of Modern Contract Doctrine* (1991) 102; see also 2 4 3 4 above.
[172] See 3 4 2 above.
[173] See 3 4 2 above.
[174] See 3 5 4 3 above.
[175] See 3 7 3 above.
[176] See for example *Cotas v Williams* 1947 2 SA 1154 (T) 1162.

modern times, such contracts have proven to be less of an obstacle, as courts are able to determine through the use of actuarial tables and expert evidence the likelihood of a given event occurring, and thus the actuarial value of the contract.[177] Where a flexible approach is used to determine fairness, contracts involving an element of change tend to present less of an obstacle.[178] Taking into account that the burden lies on the disadvantaged party to prove the value of the *merx,* it does not seem necessary to exclude the operation of fair price rules in these cases.

5 6 The nature of the relief: restitution and adaptation

The somewhat crude and arbitrary approach that the traditional doctrine of *laesio enormis* followed with regard to restitution has attracted considerable criticism.[179] No adaptation by the *iudex* was possible, and if the discrepancy was anything less than the required ratio, then no remedy was available at all. The remedy was simplistic, but it was fit for its purpose. The sale of land, and the recovery thereof, at which the *Lex Secunda* was aimed, is a discrete once-off transaction (as opposed to a contract which lasts over a duration of time). If the prejudiced party were to be restored to the status *quo ante*, he would to a large extent be in the best position possible.

The same cannot be said, for example, in a long-term contract of hire, or a contract for the supply of an important input of production. If the contract were to be invalidated, and mutual duties of restoration arose, the prejudiced party might be in an even poorer position; for example if there were costs involved in moving to a new location, in acquiring a new supplier, or simply in concluding a new contract. In these cases the approach followed by the traditional doctrine of *laesio enormis* proves to be extremely unsatisfactory.[180]

In the light of these considerations, the flexible approach to restitution followed by the model rules such as PECL and PICC, and to some extent by German law, appears to be preferable.[181] Since judicial adaptation of the contract price allows the contract to continue operating, it often presents the optimal solution for both parties

[177] See 3 4 3 1 and 3 3 4 above in this regard.
[178] See Van Loo *Vernietiging* 272.
[179] See for example Zimmermann *Obligations* 264, 270.
[180] See 2 3 2 above; the same is true for the modern remedy in Louisiana and Austria: see 3 5 4 6 and 3 4 4 above respectively.
[181] See 3 3 4 and 3 7 3 above.

involved. In this regard the approach of the model rules, which allow the contract to be adapted at the request of both the advantaged and the disadvantaged parties, should be commended.

South African law also allows for contracting parties whose consent was obtained in an improper fashion to claim compensation for damage suffered as a result of entering into the contract, irrespective of whether they choose to affirm the contract. An example of such damage might be the loss a party incurs when they pay more for a thing than it is worth.[182] It has also been noted above that the *actio quanti minoris* allows for the reduction of a contract price to the market price (even) in the case of innocent misrepresentation.[183]

Article 4:117 PECL and Article 3.2.1.6 PICC also allow for the recovery of damages (in addition to avoidance of the contract) by the disadvantaged party in order to place him in the position before the conclusion of the contract. Allowing for the recovery of damages seems desirable, and would function in a slightly less haphazard fashion than restitution in German law. The "all or nothing" nature of restitution in that system has been criticised[184] due to the fact that, in some circumstances, it leaves disadvantaged parties in an even better position than they were in before the conclusion of the contract, while possibly having quite severe consequences for the (initially) advantaged party.[185]

A more flexible approach which invests the court with the discretion as to whether to adapt the contract price, or to avoid the contract and award damages to the disadvantaged party, might therefore better protect the legitimate interests of all the parties involved. Such an approach avoids the rigidity of restitution under the traditional doctrine of *laesio enormis*, while still functioning in a more predictable fashion than restitution under German law.

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[182] See D Hutchison "Improperly Obtained Consent" in D Hutchison & C-J Pretorius (eds) *The Law of Contract in South Africa* 3 ed (2017) 117 119.
[183] See in this regard *Phame (Pty) Ltd v Paizes* 1973 3 SA 397 (A) 416.
[184] See C Schubert in FJ Säcker, R Rixecker, H Oetker, & B Limperg (eds) *Münchener Kommentar zum Bürgerlichen Gesetzbuch* (2016) § 242 [499].
[185] See the example provided in 3 3 5 above.

5 7 Conclusion

The aim of this chapter was to explore various considerations that could potentially influence the application of a fair price rule in the South African law of contract. It was argued that a flexible, case-by-case approach should be followed in determining whether a price is fair; this approach should require an objective (substantive) discrepancy between the contract price and the market price, and should also consider the (procedural) circumstances under which the contract was concluded, especially if any defect in consent, or exploitation of a form of weakness, is apparent. The exact forms of weakness or defects of consent are a matter of further debate, which might best be determined by the courts themselves. However, some guidance is provided in instruments such as Articles 4:109 PECL and 3.2.7 PICC.

Many commentators, especially in the Germanic legal systems, have expressed strong support for the idea of a flexible or movable system ("*bewegliches System"*), or sliding scale, whereby the smaller the disproportion in price, the greater the need for some evidence of a procedural defect in consent, or exploitation of need and weakness.[186] Conversely, in cases of truly extreme gross disproportion it would be possible to avoid the contract with little or even no evidence of a defect in consent, although such cases should be exceedingly rare.

As has been suggested above, such a flexible approach would provide room for the courts to take into account factors such as the relationship between the contracting parties, and the nature of the goods or services being contracted for. Courts might then also take into account the form of the price term itself, whether it is for example set out in plain language, or a transparent manner.[187] Such an approach would be flexible enough to provide thorough protection to vulnerable or structurally weaker contracting parties, while being able to deny the remedy to those contracting parties who were in fact in a strong enough position to protect their own interests.

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[186] See JE du Plessis "Grounds for Avoidance" in S Vogenauer (ed) *Commentary on the UNIDROIT Principles of International Commercial Contracts* 2 ed (2015) 511 512; Armgardt "Laesio Enormis" in *Inhaltskontrolle* 15-16; JP Dawson "Unconscionable Coercion: The German Version" (1976) 89 *HLR* 1041 1064; see Bollenberger in *Kurzkommentar* § 879 [18] who states that this is the position in Austria under § 879 ABGB.

[187] See the considerations discussed in relation to the Unfair Contract Terms Directive at 3 7 5 1; see also T Naudé "The Consumer's Right to Fair, Reasonable and Just Terms under the New Consumer Protection Act in Comparative Perspective" (2009) 126 *SALJ* 505 533.

The burden of proof of unfairness should be on the disadvantaged party alleging invalidity, but as was discussed above, this could be alleviated by presumptions of certain forms of procedural defects.[188]

A flexible approach should also be taken towards restitution, which invests the court with the discretion as to whether to adapt the contract price at the request of one of the contracting parties, or to avoid the contract and award damages to the disadvantaged party.

[188] See 5 4 above.

CHAPTER 6: PROPOSALS FOR REFORM AND CONCLUSIONS

6 1 Introduction

This study commenced with the question how a legal system can address the problem of substantively unfair contract prices, i.e. contracts where a large discrepancy exists in the value of the respective performances of the contracting parties. The historical and comparative overview in chapters 2 and 3 demonstrated that a variety of approaches address this problem, each with its own merit, but not all equally suitable for the South African law of contract.[1]

Chapters 4 and 5 concluded in turn that a fair price, if appropriately construed, would not only be consonant with a law of contract based on party autonomy, but would lead to a more comprehensive law of contract that is better able to provide relief to vulnerable contracting parties, and give expression to a number of fundamental values of our law of contract.

While there are a number of ways in which a fair price rule could be introduced to the South African law of contract, two avenues in particular are addressed in this chapter. A fair price rule might become part of South African contract law either through the adoption of a statutory remedy, which is to some extent already the case with section 48(1)(a)(i) of the CPA, or through the judicial development of the common law, and specifically the rule that contracts may not be contrary to public policy.

This concluding chapter briefly discusses the merits of these two avenues, both in terms of giving expression to the foundational values of the South African law of contract studied in chapter 4, and also in terms of giving effect to the recommendations regarding the functioning of fair price rules in chapter 5.

[1] See T Finkenauer “Laesio Enormis” in J Basedow, KJ Hopt, R Zimmermann, & A Stier (eds) *The Max Planck Encyclopedia of European Private Law* II (2012) 1029 1030 for a brief overview of these different approaches.

6 2 Developing the common law doctrine of illegality

6 2 1 The statutory abolition of the doctrine of *laesio enormis*

Before considering how the common law can be developed to introduce a fair price rule, it is necessary to confront the question whether this is at all possible, given the statutory abolition of the doctrine of *laesio enormis* in 1952.[2] Would it not be necessary for the provision abolishing the doctrine first to be repealed or declared unconstitutional? The relevant provision of the Act, which used the exact same wording as earlier statutes abolishing the doctrine in the other former provinces,[3] reads:

> "In the provinces of Natal and the Transvaal no contract shall be void or voidable by reason merely of *laesio enormis* sustained by either of the parties to such contract."

There is no doubt that the provision in question sought to bring an end to the doctrine of *laesio enormis*, which allowed prejudiced contracting parties to escape a contract if the price was less than half or more than double the fair market price.

However, considering that is has been recognised in a number of prominent South African court cases that a contract can be so manifestly unfair as to be contrary to public policy,[4] it would lead to an incongruous result if a court were to hold that contracts can be set aside due to an extremely unfair term, but not due to an extremely unfair price. Such an absurd result might in fact be open to constitutional challenge, considering the development of the public policy rule in light of the Constitution that took place in *Barkhuizen v Napier*[5] ("*Barkhuizen*") discussed below.

6 2 2 Avenues for relief under the common law

The simplest avenue through which a fair price rule could be provided under the common law might be a revival of the doctrine of *laesio enormis*. However, the

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[2] See s 25 of the General Law Amendment Act 32 of 1952; HR Hahlo & E Kahn "Two Important Changes in the Common Law" (1952) 69 *SALJ* 392 395.
[3] See Hahlo & Kahn (1952) *SALJ* 395; see also the brief discussion on the abolition of the doctrine at 1 1 above.
[4] See in particular the cases of *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A); *Barkhuizen v Napier* 2007 5 SA 323 (CC), discussed below in 6 2 2; as well as *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA) para 10.
[5] 2007 5 SA 323 (CC).

somewhat rigid and arbitrary functioning of this doctrine has been criticised a number of times in the current study and in South African case law.[6]

Chapter 5 furthermore stressed the importance of fair price rules being properly constructed if a legal system is to avoid the doctrinal and practical uncertainty that plagued the doctrine of *laesio enormis*,[7] and to minimise the risks of legal uncertainty which sometimes are ascribed to fair price rules.[8] Chapter 5 concluded therefore that a fair price rule for the South African context should consider both the objective disparity in the value of performances, as well as the procedural fairness of contract conclusion; the greater the objective disparity is proven to be, the less evidence would have to be presented of a defect in consent, and *vice versa*.[9] Such a rule should ideally take a flexible approach to both the determination of when a price is unfair, as well as to restitution, if it is to effect equitable results.[10] These considerations cannot be given effect to through a simple reintroduction of the doctrine of *laesio enormis,* and this route would therefore be unsatisfactory.

Another possibility would be to attempt to set aside contracts with unfair prices through relying directly on equitable values such as good faith or fairness. However, as was discussed in the introductory chapter, the judgment of the court in *Brisley v Drotsky*[11] ("*Brisley*") and a number of subsequent cases have made clear that abstract values such as good faith, fairness, and reasonableness are values that underlie our law of contract rather than technical rules that can directly be relied on by contracting parties seeking relief from harsh bargains.[12]

Nor can disadvantaged contracting parties resort directly to the Constitution, and the rights contained therein, in order to escape from an unjust contract;[13] this is clear from the judgments in *Brisley*[14] and *Barkhuizen*.[15] In the former judgement Cameron

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[6] See above at 2 3 2, 5 1, and 5 3 1 above; see also Hahlo & Kahn (1952) *SALJ* 393.
[7] See 1 1 and 5 1 above.
[8] See the discussion in 4 3 and 4 4 above.
[9] See 5 3 1-5 3 2, and 5 7 above.
[10] See 5 6 above.
[11] 2002 4 SA 1 (SCA).
[12] See for example *Bredenkamp v Standard Bank of SA Ltd* 2010 4 SA 468 (SCA) paras 50-53; *South African Forestry Co Ltd v York Timbers Ltd* 2005 3 SA 323 (SCA) para 27; *African Dawn Property Finance 2 (Pty) Ltd v Dreams Travel & Tours CC* 2011 3 SA 511 (SCA) para 28.
[13] See D Hutchison "The Nature and Basis of Contract" in D Hutchison & C Pretorius (eds) *The Law of Contract in South Africa* 3 ed (2017) 3 30, 31.
[14] Para 93.

JA stated that neither the Constitution nor value system it embodies grant the court a general jurisdiction to strike down contracts on the basis of unjustness. In the latter Ncgobo J clarified that the proper approach for Constitutional challenges to contractual terms is to determine whether the term in question is contrary to public policy with reference to the values which underlie the Constitution.[16]

One route which duly remains, which does indeed show some promise, is to rely on the public policy rule. The rule that a court will not enforce a contract that is against public policy is well-established in our law.[17] Although this rule has its origin in classical Roman law,[18] the modern South African rule finds early expression in the following dictum of Innes CJ in *Eastwood v Shepstone*[19]:

> "Now this Court has the power to treat as void and to refuse in any way to recognise contracts and transactions which are against public policy or contrary to good morals. It is a power not to be hastily or rashly exercised; but once it is clear that any arrangement is against public policy, the court would be wanting in its duty if it hesitated to declare such an arrangement void."

Chapter 3 pointed out that § 138 (1) BGB, the prohibition against legal acts that are contrary to public policy, is routinely used in German law as an instrument to invalidate and adapt substantively unfair contracts.[20] The possibility of developing the public policy rule to similar effect in South African law was hinted at in *Bank of Lisbon and South Africa Ltd v De Ornelas*.[21] While the majority abolished the *exceptio doli generalis*, Jansen JA[22] stated the following in his dissenting judgment:

> "The *exceptio doli generalis* constitutes a substantive defence, based on the sense of justice of the community. As such it is closely related to the defences based on public policy (interest) or boni mores … Conceivably they may overlap: to enforce a grossly unreasonable contract may in appropriate circumstances be considered as against public policy or *boni mores*."

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[15] Para 30.
[16] See in this regard Hutchison "The Nature and Basis of Contract" in *The Law of Contract* 30-32.
[17] RH Christie "The Law of Contract and the Bill of Rights" in *Bill of Rights Compendium* (online ed, 2006) para 3H8.
[18] See R Zimmermann *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1990) 706-712; J Plescia "The Development of the Doctrine of Boni Mores in Roman Law" (1987) 34 *RIDA* 265.
[19] 1902 TS 294 302; see also Christie "Law of Contract" in *Bill of Rights Compendium* para 3H8.
[20] See 3 3 above.
[21] 1988 3 SA 580 (A).
[22] 1988 3 SA 580 (A) 617; see also the discussion in FDJ Brand "The Role of Good Faith, Equity and Fairness in the South African Law of Contract: The Influence of the Common Law and the Constitution" (2009) 126 *SALJ* 71 74-75.

The indication that courts could use public policy as the basis on which to refuse to enforce manifestly unreasonable contracts came to fruition shortly thereafter in *Sasfin (Pty) Ltd v Beukes*[23] ("***Sasfin***").[24] The case concerned a deed of cession which in effect deprived a medical professional of control over his entire income. In deliberating whether the contract was contrary to public policy, the court stated while public policy generally favours the utmost freedom of contract, it should also properly take account of doing simple justice between persons. When considering the effect of the contract the court found that the relevant clauses were so "grossly exploitative" and offensive to the *mores* and interests of the public that they had to be struck down.[25]

This proposition that public policy would preclude the enforcement of a term if its enforcement were manifestly unfair, received unequivocal endorsement by the Constitutional Court in *Barkhuizen*,[26] which is now considered the *locus classicus* on public policy in the law of contract.[27]

The court in *Barkhuizen*[28] laid down a two-stage approach to the determination of whether a contractual term is contrary to public policy. The first enquiry asks whether the term itself is so manifestly unreasonable on its face or, *ex facie*, as to be contrary to public policy. If the term is held to be reasonable *ex facie* the second enquiry asks whether the term should be enforced in light of the particular circumstances which prevented compliance with the term.[29] This study is primarily interested in the first enquiry, as this part of the enquiry can best be applied to test the reasonableness or fairness of price. The following sections briefly enquire whether the approach used by the court in *Barkhuizen* can give effect to the recommendations made in chapters 4 and 5.

[23] 1989 1 SA 1 (A); see also Brand (2009) *SALJ* 74-76 for a summary of the facts of the case.
[24] See Brand (2009) *SALJ* 75.
[25] 1989 1 SA 1 (A) 14-15.
[26] 2007 5 SA 323 (CC) paras 59, 73.
[27] See for example Hutchison "The Nature and Basis of Contract" in *The Law of Contract* 31-33.
[28] See paras 55-58.
[29] See PJ Sutherland "Ensuring Contractual Fairness in Consumer Contracts after Barkhuizen v Napier 2007 5 SA 323 (CC) – Part 2" (2009) 20 *Stell LR* 50 55.

6 2 2 1 The first stage of the first Barkhuizen enquiry

The first stage of the *Barkhuizen* test was again divided into two parts. The first part asks whether the objective terms of the contract, were *ex facie* contrary to public policy.[30] In the example of the court, a provision which requires that a claim be instituted within 24 hours would be an example of such an *ex facie* unfair term.[31] Similarly it could be asked if some contract prices are so manifestly unfair that no "further information would be required" for the court to make a finding that the contract is contrary to public policy.[32]

This is conceivable, for example, where the price paid by a disadvantaged contracting party for a normal consumer good is many multiples of the normal market price. It should be kept in mind however, that the goal of a fair price rule should not be to paternalistically prevent parties from concluding detrimental agreements where they freely and autonomously choose to do so.[33]

Many cases might exist where contracting parties willingly and knowingly overpay. Think once again of the examples discussed in the previous chapters, such as the reckless purchaser, who is so wealthy as to be indifferent to the price of a thing, or the sentimental purchaser who knowingly overpays due to placing high personal value on the *merx.*[34] In chapter 2 it was observed that even the moral theologian Aquinas, with his strict adherence to just price doctrine, recognised that the contract price could not be considered unfair in the latter case.[35] Some glossators and late scholastics also denied the remedy of *laesio enormis* to parties who willingly and knowingly overpaid.[36] Voet similarly denied the remedy to those who knew the true value of the good, and nevertheless sold it, or bought it, consciously incurring *laesio enormis*.[37]

The comparative overview in chapter 3 seemed to reach a similar conclusion. Even in Austria, where a contract can be avoided solely on the basis of a discrepancy

[30] Paras 57, 59.
[31] Para 60.
[32] Sutherland (2009) *Stell LR* 55-56.
[33] See the discussion above at 5 3 2 2.
[34] See 4 2 6 2 above.
[35] See 2 4 2 3 2, J Finnis *Aquinas: Moral, Political, and Legal Theory* (1998) 202.
[36] H Kalb *Laesio Enormis in Gelehrten Recht* (1992) 115, 167; see 2 4 1 2 above.
[37] *Commentarius ad Pandectas* 18 5 17.

in the value of performances, the application of § 934 AGBG is excluded both where the disadvantaged party knew the true value of the *merx* and nevertheless overpaid, as well as where the disadvantaged party overpaid due to placing a higher value on the *merx* for personal reasons.[38] The same is true in Germany.[39]

It seems therefore that one of the lessons learned from the historical and comparative chapters, is that it is very difficult to declare a contract price unfair without considering the circumstances under which the contract was concluded.

The conclusion that can be drawn from this, is that while cases might conceivably exist where a court following the *Barkhuizen* approach sets aside a contract because the price is *ex facie* unfair (without any consideration for procedural issues or the circumstances of contract conclusion), these cases should be exceedingly rare.

6 2 2 2 The second stage of the first Barkhuizen enquiry

According to the second part of the first *Barkhuizen*[40] enquiry, it then has to be determined if the term was contrary to public policy in light of the relative situation of the contracting parties. This entails a weighing up of sanctity of contract against the relevant competing considerations of public policy.[41] On the one hand public policy requires that parties should comply with contractual obligations freely undertaken, as expressed by the maxim *pacta sunt servanda*. This should be weighed up against the specific rights and values that could be impacted through applying the application of the public policy rule (in our case to set aside contracts with unfair prices).

The determinants of public policy are not static but rather change over time, and so do not constitute a closed list.[42] Since the advent of the Constitution it is also possible for the courts to develop the common law to give effect to constitutional imperatives, either indirectly through section 39(2) or directly through section 8. These imperatives include specific constitutional rights, such as dignity, constitutional values, for example, good faith, *Ubuntu*,[43] and *pacta sunt servanda*,[44] as well as

[38] See 3 4 3 3 and 3 4 3 4 above.
[39] See 3 3 3 4 above.
[40] Paras 57, 59.
[41] See Hutchison "The Nature and Basis of Contract" in *The Law of Contract* 32.
[42] See *Magna Alloys & Research (SA) (Pty) Ltd v Ellis* 1984 4 SA 874 (A) 891; *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A) 8.
[43] *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 51.

other policy considerations that are compatible with the Constitution, although not necessarily expressly recognised.[45] It has been recognised by the courts and a number of academics that Constitutional rights and values should be central to public policy analysis, and that public policy should be used as a doctrinal gateway for the introduction of these values into the common law of contract.[46]

A number of these rights and values were considered in chapter 4, which evaluated the desirability of a fair price rule. The role which these values play in the weighing up of the relevant considerations contemplated in the second stage of the first *Barkhuizen* enquiry can now be considered.

6 2 2 2 1 Pacta sunt servanda

The importance attached by South African courts to the idea that voluntarily concluded contracts should be enforced, encapsulated in the maxim *pacta sunt servanda*, was considered in chapter 4.[47] The centrality of *pacta sunt servanda* to public policy was again recognised by the court in *Barkhuizen*, where it was noted that the enforcement of contracts gives effect to the constitutional values of freedom and dignity.[48] Ngcobo J stated further that *pacta sunt servanda* is a profoundly moral principle, but also recognised that the general rule that agreements should be applied does not apply to agreements which violate public policy.[49]

The court in *Barkhuizen* also noted that the extent to which the contract in question was voluntarily concluded needs to be taken into account when considering how much weight should be attached to *pacta sunt servanda*.[50] In this regard, the court placed particular emphasis on the relative situation and circumstances of the contracting parties and specifically on inequality of bargaining power.[51] However, it is

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[44] *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 57; *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 1 SA 256 (CC) paras 22-23.
[45] See *Bredenkamp v Standard Bank of SA Ltd* 2010 4 SA 468 (SCA) paras 38-39.
[46] See *Brisley v Drotsky* 2002 4 SA 1 (SCA) paras 91 & 92; *Napier v Barkhuizen* 2006 4 SA 1 (SCA) paras 6 and 7; Brand (2009) *SALJ* 84; Lubbe (2004) *SALJ* 404; Christie "Law of Contract" in *Bill of Rights Compendium* para 3H8; S Laing & D Visser "Principles, Policy and Practice: Human Rights and the Law of Contract" in E Reid & D Visser (eds) *Private Law and Human* Rights (2014) 330 336.
[47] See 4 2 6 1 above.
[48] Para 57.
[49] Para 87.
[50] See paras 87, 57.
[51] Para 64.

submitted that other aspects of procedural fairness can also be considered here,[52] as courts have indeed done in the past as part of the public policy enquiry,[53] and as other aspects of procedural unfairness could also serve to indicate the extent to which a contract was voluntarily concluded.

In chapter 4 it was argued that contracts with a gross discrepancy in the value of the respective performances are more often than not the result of a procedural defect or some form of unconscionable conduct in the conclusion of the contract.[54] Examples of such might be the exploitation of weakness, economic duress, or circumstances of need of the disadvantaged party, the presence of standard form contracts, the manipulation of cognitive biases, or any number of defects in consent.[55]

Sutherland noted similarly in his analysis of the judgment in *Barkhuizen* that it is unlikely that a contracting party in a truly equal bargaining position would voluntarily accept unfair terms.[56] The greater the discrepancy between the value of the performances, and the more unfair the contract price, the more so this is arguably true.[57]

The extent to which such manifestly unfair contracts can be considered a manifestation of party autonomy and dignity is therefore doubtful.[58] It is for this reason that is was argued in chapter 4, that setting aside contracts with unfair prices could serve to protect the party autonomy of weaker contracting parties, and advance the empowerment conception of dignity. Setting aside contracts where the substantive unfairness of the contract indicates that a defect in consent might have

[52] See Sutherland (2009) *Stell LR* 57.
[53] See for example M Kruger "The Role of Public Policy in the Law of Contract, Revisited" (2011) 128 *SALJ* 712 722; *Magna Alloys & Research (SA) (Pty) Ltd v Ellis* 1984 4 SA 874 (A) 894-895; *Basson v Chilwan* 1993 3 SA 742 (A) 762-763; *African Dawn Property Finance 2 (Pty) Ltd v Dreams Travel & Tours CC* 2011 3 SA 511 (SCA) paras 19-21.
[54] See 4 2 6 2 above.
[55] This is discussed at 4 2 6 3 above.
[56] Sutherland (2009) *Stell LR* 60.
[57] See H Eidenmüller "Justifying Fair Price Rules in Contract Law" (2015) 11 *ERCL* 220 227.
[58] See also *Gerolomou Constructions (Pty) Ltd v Van Wyk* 2011 4 SA 500 (GNP) para 24.

been present at the time of conclusion might therefore promote rather than detract from the principle of *pacta sunt servanda.*[59]

6 2 2 2 2 Dignity as a constraint

Chapter 4 also argued that applying the public policy rule to set aside contracts with an unfair price can also support the conception of dignity as a constraint, both through promoting the idea that contracting parties have a measure of regard for the interests of their contracting partners, and by setting aside those contracts where it is clear that the disproportionate nature of the contract will affect the ability of the disadvantaged party to live a dignified life.[60]

6 2 2 2 3 Good faith and *Ubuntu*

The court also recognised in *Barkhuizen*[61] that values such as good faith and *Ubuntu* are also relevant to the determination of public policy. In chapter 4 it was argued that the good faith as a legal norm can be described as a standard of open, honest, and considerate behaviour characterised by acting with a degree of respect or consideration for the interests of opposing contracting parties.[62] The court in *Barkhuizen* stated in similar fashion that good faith as a value is related to concepts of justice, reasonableness, and fairness.[63] It was therefore argued in chapter 4 that setting aside contracts with unfair prices, and thereby requiring that parties should show a measure of regard for the interests of their contracting parties in the bargaining process, might give expression to good faith as a value in our law. It was similarly argued in chapter 4 that setting aside contracts with unfair prices can promote the concept of *Ubuntu*, which places an emphasis on mutual respect and the recognition of the humanity and dignity inherent in others.[64]

[59] See 4 2 6 2 above; see also Sutherland (2009) *Stell LR* 62-63; JE du Plessis "Illegal Contracts and the Burden of Proof" (2015) 132 *SALJ* 664 685.
[60] See 4 2 7 2 above; in relation to the role of dignity as a constraint in the determination of public policy see *Coetzee v Comitis* 2001 1 SA 1254 (C) paras 34-41.
[61] See paras 51, 79-82.
[62] See 4 2 7 5 above.
[63] Para 79
[64] See 4 2 7 4 above.

6 2 2 2 4 Legal certainty

The argument was discussed in chapter 4 that setting aside contracts on the basis of an unfair price might lead to an untenable degree of legal and economic uncertainty.[65] It was noted however that while the point is often raised by opponents of fair price rules, it does not seem to be the case in practice. Fair price rules with a comparative functioning to that proposed in chapter 5 exist in a number of foreign jurisdictions – most notably in Germany, where the rule is also based on public policy – and yet no clear case can be made out that a much greater degree of legal uncertainty exists in these countries than in South Africa.

Since South African courts have already taken the position in cases such as *Sasfin*,[66] that an agreement can be so manifestly unfair as to be contrary to public policy, it could even be argued that it would lead to an increase in legal certainty if a court were to clarify how this applies to unfair prices, and transparently set out what considerations it would take into account to determine the fairness of price.

Lastly it was noted, that while certainty is important, it cannot by itself serve as a reason for a court to enforce an immoral or unjust contract.

6 2 2 2 5 Economic efficiency

As was noted it chapter 4, it is sometimes held that the control of process is not in the public interest, as it endangers the efficient functioning of the economy.[67] However, it was argued in chapter 4 that contracts with excessive prices are often economically inefficient contracts, especially where the excessive price was induced by a procedural defect in the conclusion of the contract, such as the abuse of circumstances, economic duress, information asymmetries, or an inability of one of the parties to understand the benefits of a complex contract.[68] It was further argued that enforcing contracts with unfair prices can also create inefficient incentives for

[65] See 4 3 above.
[66] 1989 1 SA 1 (A) 14-15.
[67] See 4 4 1 above.
[68] See 4 4 2 above.

contracting parties or third parties.[69] Setting aside contracts with an unfair price might thus advance rather than endanger economic efficiency.

6 2 3 Conclusion

The second stage of the first *Barkhuizen* enquiry therefore seems to be well suited to the consideration of the fairness of price. Through the use of the public policy rule, the court is able to both take into account the substantive fairness of the contract price, as well as a host of considerations of procedural fairness in the balancing of the relevant rights and values impacted by the application of the public policy rule.

This approach can also be compared to the approach of German courts to fair prices as discussed in chapter 3. In both of these cases the courts follows a flexible approach that is able to take into account both the objective terms of the contract, and the relative situation of the contracting parties when deciding whether the contract price is fair.[70]

Such a flexible approach aligns well with the idea of a movable system, or sliding scale, whereby the less substantively unfair the price is held to be in the first stage of the first *Barkhuizen* enquiry, the greater the need for some evidence of a procedural defect in consent, or exploitation of need and weakness, in the second stage of the first *Barkhuizen* enquiry.

There is of course the argument to be made that such a rule should more appropriately be implemented by the lawgiver, who should be the “major engine” for law reform.[71] A number of commentators have however pointed out that there seems to be little chance of reform originating from the legislature in this regard,[72] as the preference of the legislature seems to be to intervene with more specific legislation aimed at particular fields such as consumer protection.[73]

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[69] See 4 4 2 above.
[70] See 3 3 3 above.
[71] See *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) para 36; Wallis (2015) *SALJ* 934.
[72] See Brand (2009) *SALJ* 77; J du Plessis “Threats and Excessive Benefits or Unfair Advantage” in HL MacQueen & R Zimmermann (eds) *European Contract Law: Scots and South African Perspectives* (2006) 151 167.
[73] Brand (2009) *SALJ* 77.

Furthermore, South African courts have always had the inherent ability to develop the common law to bring it into step with the development of society, even by bold steps.[74] It is also trite that the law of contract should give expression to constitutional demands,[75] yet it is often bemoaned that the impact of the Constitution on the development of the common law of contract has been too limited.[76]

In the absence of meaningful action, or prospects therefor, on the part of the lawgiver to develop the common law in line with constitutional imperatives and to bring the common law of contract into step with modern commercial reality, the courts should not hesitate to step in to do so. To give effect to the values discussed above, the introduction of a fair price rule into our common law of contract through the application of the public policy rule would be both appropriate and desirable.

6 3 A fair price rule in the Consumer Protection Act.

Thus far this chapter has discussed the introduction of a fair price rule through the development of the common law of contract. A more limited form of judicial price control can, however, already be found in the Consumer Protection Act 68 of 2008 ("CPA"). Section 48 of the Act, under Part G labelled "Right to fair, just and reasonable terms and conditions" contains a general prohibition against unfair, unreasonable, or unjust contract terms. Section 48(1)(a)(i) prohibits a supplier from entering into an agreement at a price that is unfair, unreasonable, or unjust.

A number of commentaries deal much more comprehensively with the functioning of section 48(1)(a)(i).[77] This is not the aim here; it will rather be sought to provide some brief remarks regarding the proposed functioning and interpretation of section 48(1)(a)(i), taking into account the lessons learned from the comparative and evaluative chapters above.

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[74] See for example *Blower v Van Noorden* 1909 TS 890 905; *Phame (Pty) Ltd v Paizes* 1973 3 SA 397 (A); *Hurwitz v Taylor* 1926 TPD 81; see also the discussion in *Janse van Rensburg v Grieve Trust CC* 2000 1 SA 315 (C) 324; Lubbe (2004) *SALJ* 402, 410.

[75] See for example *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 1 SA 256 (CC) paras 22-23, 71; *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 35.

[76] See for example D Davis "Private Law After 1994: Progressive Development or Schizoid Confusion?" (2008) *SAJHR* 318 324; Lubbe (2004) *SALJ* 410; see the discussion in M Wallis "The Common Law's Cool Ideas for Dealing with Ms Hubbard" (2015) 132 *SALJ* 940 942.

[77] See T Naudé "Section 48" in T Naudé & S Eiselen (eds) *Commentary on the Consumer Protection Act* (RS 2 2017).

6 3 1 Does the CPA contain a fair price rule?

A number of authors have questioned to what extent section 48(1)(a)(i) constitutes a price control mechanism.[78] According to Van Eeden, no strong argument can be made that section 48(1)(a)(i) was intended to serve as a price control mechanism,[79] and the section should therefore only be "appropriately applied" where in addition to unfair price, other unfair terms, or forms of procedural unfairness such as for example, those indicated in section 40(2) of the Act, are present.[80]

However, such an interpretation arguably ignores the ordinary meaning of section 48(1)(a)(i) of the Act.

The approach of South African courts to the interpretation of statutes, as laid down by the Supreme Court of Appeal in *Natal Joint Municipal Pension Fund v Endumeni Municipality*,[81] and recently confirmed in *Sigcau v Minister of Cooperative Governance and Traditional Affairs*,[82] is as follows:

> "Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production."

Wallis JA further endorsed the proposition that the inevitable point of departure when interpreting a provision is the language of the provision itself, and noted that courts need to guard against the temptation to substitute what they regard as reasonable or sensible for the words actually used.[83]

If this approach is followed, it is difficult to infer from the language used, in light of the ordinary rules of grammar and syntax, that section 48(1)(a)(i) is not intended to be a price control mechanism, or should only apply when some form of procedural

[78] See for example EP van Eeden *A Guide to the Consumer Protection Act* (2009); EP van Eeden *Consumer Protection Law in South Africa* (2013) 263; J Barnard "Unfairness of Price and the Doctrine of *Laesio Enormis* in Consumer Sales" (2013) 76 *THRHR* 521 535.
[79] Van Eeden *A Guide to the CPA* 186-187.
[80] Van Eeden *Consumer Protection Law* 263.
[81] 2012 4 SA 593 (SCA) para 18.
[82] 2017 3 All SA 608 (SCA) para 21.
[83] 2012 4 SA 593 (SCA) para 18.

unconscionability is present, as no such limitation is apparent from the text of the provision itself.

Neither could such a conclusion be reached when following a more purposive interpretation of the provision in terms of the purposes of the Act.[84] Section 2(1) of the Act determines that it must be interpreted in a manner that gives effect to its purposes set out in section 3.[85] De Stadler and Du Plessis argue that when section 2(1) is read together with the purposes of the Act in section 3(1), as well as section 4(3) of the Act, following a purposive interpretation will inevitably lead to the result that any ambiguous provisions in the Act must be interpreted in favour of the consumer.[86] It is in their opinion difficult to envision a persuasive argument for the interpretation of an ambiguous term against the consumer.[87] An interpretation of section 48(1)(a)(i) which requires both some form of procedural unconscionability, in addition to an unfair price, limits the redress available to the consumer and arguably cannot be considered an interpretation in favour of the consumer.

It therefore seems that a court following a reasonable interpretation of 48(1)(a)(i) could invalidate a contract due to an unfair price, without any proof of procedural unfairness in the conclusion of the contract. The question of whether this is desirable mirrors the discussion above, of whether a court should *ex facie* declare a price to be unfair in the first stage of the public policy enquiry.[88]

However, an important distinction needs to be made here. The fact that section 48(1)(a)(i) does not require that the disadvantaged party prove unconscionable conduct, does not mean that considerations of procedural fairness cannot be taken into account in determining whether a price is fair. On the contrary, the mandatory nature of section 52(2) of the CPA discussed below necessitates that a court does so. Courts applying section 52 should make use of the broad powers and discretion vested in it by the provision to deny the remedy to those contracting parties who were

[84] See E de Stadler & E du Plessis "Section 2" in *Commentary on the CPA* (RS 2 2017) paras 9-14 on the purposive interpretation of the Act.
[85] Section 2(1) of the CPA.
[86] See De Stadler & Du Plessis "Section 2" in *Commentary on the CPA* paras 11, 12.
[87] Para 12.
[88] See above at 6 2 2 1.

in fact in a strong enough position to protect their own interest, but nevertheless consented to the excessive price.[89]

In this way a court can strike the balance recommended in chapter 5, where it is able to provide thorough protection to the most vulnerable contracting parties envisaged in section 3(b) of the Act, while limiting abuse of the Act by denying the remedy to those parties who were in fact in a strong enough bargaining position to look after their own interest.[90]

6 3 2 The functioning of the fair price rule in section 48(1)(a)(i)

A number of commentators have pointed out that the CPA provides little guidance as to what constitutes a price that is "unfair, unreasonable or unjust".[91] The wording of section 48(1)(a)(i) itself is not very helpful, since the terms unfair, unreasonable, and unjust are arguably synonyms.[92] Section 48(2) seeks to provide more guidance as to the meaning of "unfair, unreasonable and unjust", but only the first two paragraphs relate to content control.[93] The wording of section 48(2) also indicates that it does not limit the generality of section 48(1), meaning that the considerations listed under section 48(2) are arguably not a closed list.[94]

Section 48(2) determines that:

> Without limiting the generality of subsection (1), a transaction or agreement, a term or condition of a transaction or agreement, or a notice to which a term or condition is purportedly subject, is unfair, unreasonable or unjust if:
>
> (a) it is excessively one-sided in favour of any person other than the consumer or other person to whom goods or services are to be supplied;
>
> (b) the terms of the transaction or agreement are so adverse to the consumer as to be inequitable; of the Act provides scant guidance

Naudé points out that section 48(2)(b) also provides little guidance as "inequitable" is arguably just another synonym for unfair. By contrast, paragraph (a) does provide some guidance by referring to "excessively one-sided", which Naudé argues would

[89] See for example, 5 3 2 2 & 5 5 3 above.
[90] See the discussion of this point at 5 3 2 and especially 5 3 2 2 above.
[91] Van Eeden *A Guide to the CPA* 186; Naudé "Section 48" in *Commentary on the CPA* paras 1, 12, 38; RD Sharrock "Judicial Control of Unfair Contract Terms: The Implications of the Consumer Protection Act" (2010) 22 *SA Mercantile LJ* 295 307-308.
[92] See Naudé "Section 48" in *Commentary on the CPA* para 1.
[93] Para 12.
[94] Paras 12, 22.

necessitate the weighing up of the rights and obligations of the parties to determine one-sidedness.[95]

Despite no such limitation being apparent from the text of the provision, a number of commentators seemingly agree that the provisions contained in section 48(2) do not apply to contract price(s), and that they therefore cannot be used to interpret unfairness in terms of section 48(1)(a)(i). However, these writers offer very little by way of justification for such a claim. Sharrock,[96] Barnard,[97] and (HM) Du Plessis[98] all cite Van Eeden[99] to substantiate the claim that the guidelines in section 48(2) do not apply to prices, without providing any justification of their own. Van Eeden in turn simply states that "The basic unfairness standards in section 48(2) do not apply to prices", and that reference therefore needs to be made to the general unfairness standard in section 52(2), without providing any further justification.

Elsewhere Van Eeden substantiates the same claim by arguing that this is the effect of the operation of section 48(2), which refers to a: "transaction or agreement, a term or condition of a transaction or agreement" but not to a "price".[100] However, it is self-evident that the contract price forms part of the terms of a contract, both from the explanation of contract price provided by Van Eeden,[101] and from the definition of "price" provided in the Act itself ("…the total amount paid or payable by the consumer to the supplier in terms of that transaction or agreement…").[102] It therefore seems reasonable to interpret that section 48(2), which explicitly refers to the terms of the agreement, does in fact apply to price.

The Act also provides no guideline for what constitutes a "fair price" as opposed to an unfair price.[103] The question of what the appropriate guideline is for a fair price was discussed at length in chapter 5, where it was submitted that as it is the norm

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[95] Para 12.
[96] Sharrock (2010) *SA Mercantile LJ* 308.
[97] Barnard (2013) *THRHR* 530.
[98] HM du Plessis *The Unilateral Determination of Price in Contracts of Sale Governed by the Consumer Protection Act 68 of 2008* LLM Dissertation, University of Pretoria (2012) 126.
[99] Van Eeden *A Guide to the CPA* 184.
[100] Van Eeden *Consumer Protection Law* 261 n 158.
[101] See Van Eeden *Consumer Protection Law* 262, where he states: "The price at which goods or services are sold constitutes one of the terms of a contract."
[102] See the definition of "price" in s 1 of the CPA.
[103] See Van Eeden *A Guide to the CPA* 186.

both historically and internationally,[104] and as it is a standard that is familiar to South African courts,[105] the market price should generally be used as the guideline for a fair price,[106] taking into account the challenges and shortcoming of such an approach discussed in chapter 5, especially in relation to defective markets.[107]

Naudé has also suggested that courts should only intervene where the contract price is "manifestly unjust" or where there is a "gross disparity" in the value of the performances (as was in fact the case in the original form of the bill introduced to Parliament), rather than where price is simply "unfair".[108] Naudé's suggestion in this regard should be supported. In chapters 4 and 5 it was argued that a threshold for an "unfair price" that is very low (i.e. a threshold that does not require great discrepancy between the contract and the market price), might lead to a large amount of validly concluded contracts being invalidated.[109] Eidenmüller also criticised the proposed fair price rule in the CESL on a similar basis, noting that if threshold required for an unfair price were too low, it would potentially lead to great legal uncertainty, and arguably not constitute an economically efficient rule.[110]

Section 52 of the Act regulates the powers of the court to ensure fair contract terms. For purposes of the current discussion, it sets out the list of factors which a court must consider when a contravention of section 48 is alleged in section 52(2), as well as the orders that a court may make if it determines that a contract is in whole or in part unconscionable or unfair in section 52(3).

Section 52 is problematic for a number of reasons.[111] Firstly, section 52 only finds application if the Act does not otherwise provide a sufficient remedy to correct the relevant prohibited conduct or unfairness.[112] However, it is unclear which remedies are contemplated in this section, and how it is to be assessed whether these

[104] See 5 2 1 4 above; s 2(a) of the CPA determines that appropriate foreign and international law may be taken into account when interpreting or applying the Act.
[105] See 5 2 2 1 above.
[106] This also appears to be the suggestion of Van Eeden *A Guide to the CPA* 186; Sharrock (2010) *SA Mercantile LJ* 310.
[107] See 5 2 4 above.
[108] See T Naudé "Introduction to ss 48-52 and reg 44" in *Commentary on the CPA* (RS 2 2017) para 5; T Naudé "The Consumer's Right to Fair, Reasonable and Just Terms under the New Consumer Protection Act in Comparative Perspective" (2009) 126 *SALJ* 505 532-533.
[109] See 4 4 2 and 5 3 1 above.
[110] This is discussed in 4 4 2 above; see Eidenmüller (2015) *ERCL* 227.
[111] See in this regard, Naudé "Introduction to ss 48-52 and reg 44" in *Commentary on the CPA* para 6.
[112] See s 52(1)(b).

remedies are sufficient.[113] When read with section 69, which sets out the ways in which a consumer may seek to enforce his rights, and especially section 69(d), it seems that a consumer would only be able to approach a court after a number of other remedies provided for in the CPA such as alternative dispute resolution, and making a complaint to the National Consumer Commission, have been exhausted.[114] This places a substantial obstacle in the way of consumers seeking redress against unfair terms, and arguably contradicts the purpose of the Act, which is to provide consumers with effective relief.[115]

Secondly, in contrast to the list provided in section 48(2), the provision does not make clear whether or not the list in section 52(2) is exhaustive.[116] However, it does not seem to prohibit the court from considering other factors either.[117]

Some commentators have gone as far as to suggest that the list of factors should be deleted, leaving it to the courts to develop the list of relevant considerations for the assessment of fairness.[118] This is to be preferred to a closed list. As it has been argued above, a flexible test which invests discretion in the court to take into account all the factors which they consider to be relevant is arguably most appropriate for achieving equitable results.[119]

The factors in the list have been analysed in great detail.[120] Only two of these can however be related to substantive fairness, and are, for our purposes, rather unsatisfactory. These are: paragraph (a) the fair value of the goods or services in question; and (i) the amount for which, and circumstances under which, the consumer could have acquired identical or equivalent goods or services from a

[113] See Van Eeden *A Guide to the CPA* 191; Sharrock (2010) *SA Mercantile LJ* 316.
[114] Sharrock (2010) *SA Mercantile LJ* 324.
[115] 324.
[116] See T Naudé & C Koep "Factors Relevant to the Assessment of the Unfairness or Unreasonableness of Contract Terms: Some Guidance from the German Law on Standard Contract Terms" (2015) 26 *Stell LR* 85 100, 108-109; T Naudé "Section 52" in *Commentary on the CPA* (RS 2 2017) para 11.
[117] Naudé "Section 52" in *Commentary on the CPA* para 11.
[118] Naudé & Koep (2015) *Stell LR* 109.
[119] See especially 5 3 1 above.
[120] See Naudé "Section 52" in *Commentary on the CPA* para 11-50; Sharrock (2010) *SA Mercantile LJ* 309-314.

different supplier. As has been argued above,[121] fair value should be interpreted as referring to the market price of the goods.

The majority of the factors on the list relate to considerations of procedural fairness, such as the nature of the parties to the agreement, the circumstances that existed or were foreseeable at the time of conclusion of the contract, the conduct of the consumer and the supplier respectively, and to the extent of negotiations between the parties.[122]

Since the court is mandated to take this list into account when a contravention of section 48(1)(a)(i) is alleged, the procedural fairness of the contract conclusion should indeed play a role in determining whether a price is fair, despite the fact that section 48(1)(a)(i) arguably does not require that the consumer prove procedurally unconscionable conduct.

6 3 3 Restitution in terms of the CPA

In the event that a court determines that an agreement was in whole or in part unconscionable, section 52(3)(a) and (b) grant wide ranging powers to make an order that the court considers just and reasonable in the circumstances, which includes but is not limited to the restoration of money to the consumer, and an order compensating the consumer for losses relating to the agreement.[123]

Section 52 refers only to the power of “courts”, which seems to imply that other bodies (including provincial consumer courts as they are explicitly excluded from being considered “courts” in terms the definition provided in section 1 of the Act) would not have the jurisdiction to provide relief for unfair prices.[124] While the wide-ranging powers granted to the court to effect restitution should be applauded, as this concurs with the flexible approach to restitution suggested above,[125] the barriers to the application of section 52 do present a significant challenge for consumers seeking redress.

[121] See 5 2 1 4 above.
[122] Paras (b), (c), (d), and (e) respectively.
[123] See the discussion in Naudé “Section 52” in *Commentary on the CPA* para 53.
[124] See paras 6-8.
[125] See 5 6 above.

6 3 4 Conclusion

While it is in theory possible for section 48(1)(a)(i) to function as the type of fair price rule envisaged in chapters 4 and 5, its ability to realise its potential is hampered by the manifold barriers in the way of consumers approaching the courts. Problems presented by a lack of guidelines as to what constitutes a fair or an unfair price, are not insurmountable, as they could otherwise be mitigated through being further developed by the courts. However, there is a paucity of cases where a party is able to approach the court and raise section 48(1)(a)(i): it is unclear whether there has been a single reported case where a consumer has successfully done so.[126] It would seem therefore that reform to the CPA is desirable, in order to allow consumers much easier access to the court to avail themselves of the protection of this provision.

6 4 Conclusion

The medieval civilians, late scholastics, and the natural lawyers of the *ius commune* may have had different conceptions of what constitutes a just price, but it is evident that they all viewed an unjust price as an evil that deserved to be remedied. This idea fell out of favour during the 18th and 19th century, as enlightenment thinking and economic liberalism denied the existence of a *iustum pretium*, considering it to be a fanciful idea, based on metaphysical concepts, and infringing on individualistic notions of freedom of contract.[127] According to these jurists, the contents of contracts depend only on the free will of the parties, and accordingly no just price can exist outside of that agreed upon by the parties themselves.[128] This view would prevail during the age of codification, and would eventually lead to the complete abolition of the doctrine of *laesio enormis* in South Africa in 1952.[129]

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[126] In *Doyle v Killeen* (NCT/12984/2014/75(1)(b)CPA) 2014 ZANCT 43 (25 September 2014) there was no reason for the court to consider s 48(1)(a)(i), though it was raised, as the court found that the Act did not find application. In *City of Johannesburg v National Consumer Commission* (NCT/2667/2011/101(1)(P), NCT/2081/2011/101(1)(P)) 2012 ZANCT 6 (30 March 2012), the Respondent raised s 48(1)(a)(i), but in doing so seemingly confused an unfair price and an unfair practice.

[127] See also 3 2 above; Zimmermann *Obligations* 264-265.

[128] *De Aequitate Cerebrina* 2 16 from T Anhert "Roman Law in the Early Enlightenment Germany: The Case of Christian Thomasius' *De Aequitate Cerebrina Legis Secundae Codicis de Rescindenda Venditione* (1706)" (1997) 24 *Ius Commune Zeitschrift für Europäische Rechtsgeschichte* 153 158.

[129] Discussed above at 1 1.

However, as is often argued, there appears to be life after death for the fair price rule.[130] It has become increasingly clear with the resurgence in interest in fair price doctrines since the latter half of the 20th century,[131] that protecting weaker contracting parties and preserving contractual justice requires addressing the problem of substantively unfair contract prices more directly.[132] In South Africa the need for some form of intervention in order to protect weaker contracting parties and ensure greater fairness in contract was similarly recognised, and repeatedly expressed,[133] especially after the abolition of the *exceptio doli* in *Bank of Lisbon and South Africa Ltd v De Ornelas*.[134]

While a number of foreign jurisdictions studied in chapter 3 provide relief to prejudiced contracting parties through doctrines such as *laesio enormis*, unconscionability, or public policy, disadvantaged parties are by contrast left with little recourse from unfair contract prices in the South African common law of contract as it currently stands.

The most significant development in this regard, section 48(1)(a)(i) of the CPA, which in theory amounts to a fair price rule, appears to have failed in its task of providing relief to contracting parties prejudiced by unfair prices, arguably due to the impediments to accessing the courts which disadvantaged parties seeking relief need to surmount. It should also be kept in mind, as discussed above, that the scope of application of section 48(1)(a)(i) is limited to those transactions which are governed by the Act.[135]

The concluding chapter has proposed that a fair price rule should be introduced into South African common law of contract through the further development of the public policy rule. It has argued that doing so can give expression to a number of foundational values of our law of contract, such as party autonomy, dignity, good

[130] See for example Zimmermann *Obligations* 268.
[131] See the sources cited above in chapter 1, nn 28, 29.
[132] See for example A Perrone "The Just Price Doctrine and Contemporary Contract Law: Some Introductory Remarks" (2014) 125 *Rivista Internazionale di Scienze Sociali* 217 218.
[133] See Hutchison "The Nature and Basis of Contract" in *The Law of Contract* 28-30; T Naudé "Unfair Contract Terms Legislation: The Implications of Why We Need it for its Formulation and Application" (2006) 17 *Stell LR* 361 and the sources cited there, especially in n 3; see South African Law Commission *Unreasonable Stipulations in Contracts and the Rectification of Contracts* Project 47 (1998); P Aronstam *Consumer Protection, Freedom of Contract and the Law* (1979) 45-46.
[134] 1988 3 SA 580 (A) 605-606.
[135] See 1 2 above; see s 5 of the CPA.

faith*, and Ubuntu*. Furthermore, the development of the public policy rule in such a manner arguably leads to a more comprehensive law of contract that is better able to protect and give effect to the will of contracting parties. Moreover, such a rule corrects injustice which is plain for all to see; injustice that more often than not comes at the cost of the most vulnerable members of our society.

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